VOLUME XXI. NUMBER 1.

Massachusetts Law Quarterly

JANUARY, 1936

CONTENTS

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

NOTICE IN REGARD TO THE ANNUAL MEETING.

The twenty-sixth annual meeting of the Massachusetts Bar Association will be held probably in the latter part of January after the Annual Report of the Judicial Council and the Report of the Special Commission, created by Chapter 62 of the Resolves of 1935, to investigate the subject of district courts and other matters, have been filed.

The Judicial Council Report is reprinted herewith. The Report of the Special Commission is expected later, some time in January, and will be bound up in the QUARTERLY and sent to members as soon as filed.

At the meeting, the annual business of election of officers and other matters will be taken up and the meeting will then be thrown open for discussion of the recommendations in the reports referred to.

Notice of the time and place of the meeting will be sent out as soon as they are decided upon.

F. W. GRINNELL, *Secretary*,
60 State Street,
Boston, Massachusetts.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

Of Massachusetts Law Quarterly, published quarterly at Boston, Mass., for October 1, 1935.

Publisher, Massachusetts Bar Association, 60 State Street, Boston, Mass.

Editor, The Publication Committee of the Association.

Managing Editor, FRANK W. GRINNELL, Secretary of the Association.

Business Managers, Same as above.

Owners, Massachusetts Bar Association.

President, Nathan P. Avery. *Treasurer*, Horace E. Allen. *Secretary*, Frank W. Grinnell.

Known bondholders and other security holders, none.

FRANK W. GRINNELL.

Sworn to and subscribed before me this 30th day of September, 1935.

Notary Public.

(My commission expires

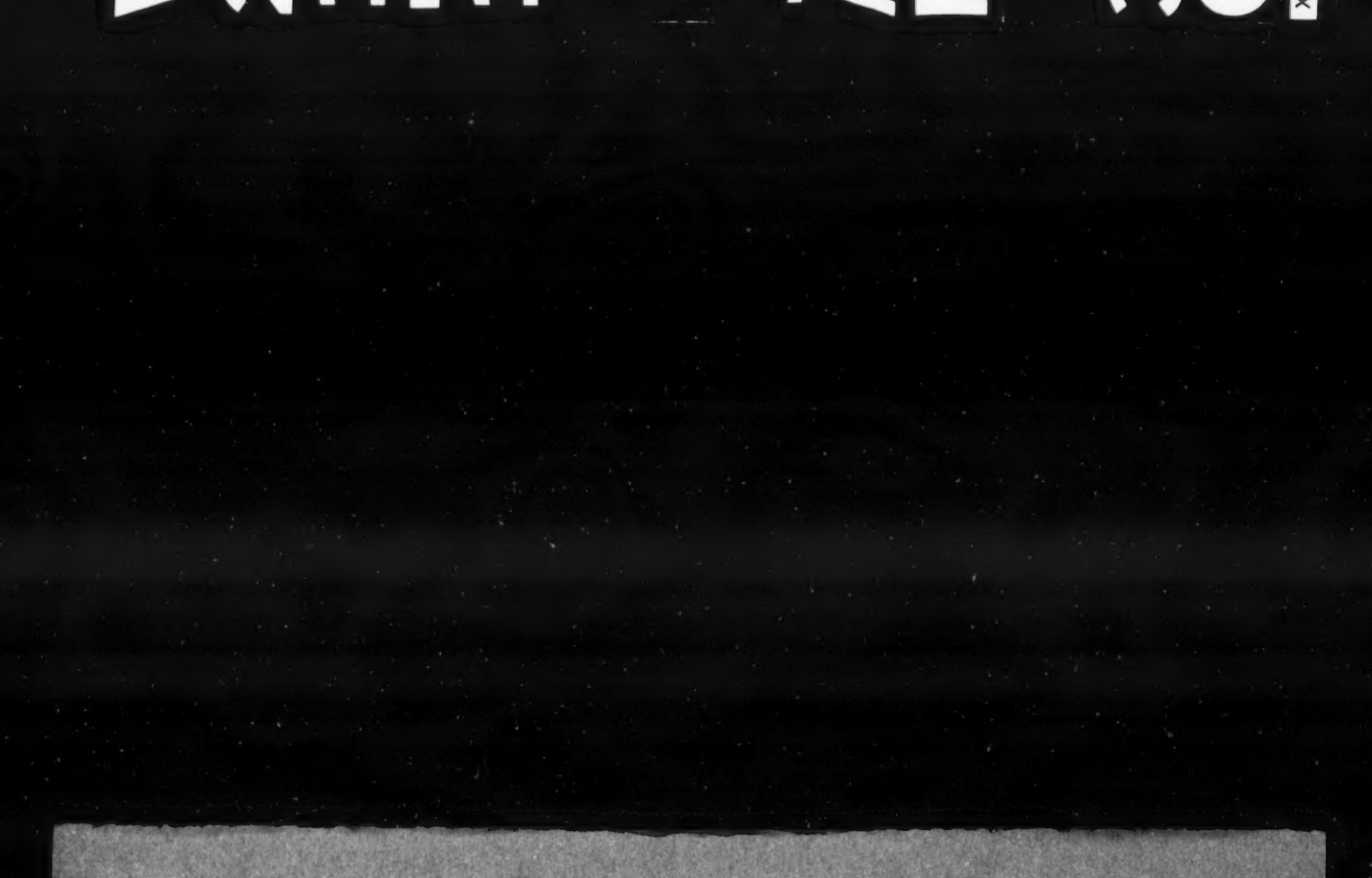
[SEAL]

NOTICE OF CHANGE OF DATES OF REGULAR ISSUES OF THE MASSACHUSETTS LAW QUARTERLY.

Beginning with this issue the four regular issues of the MASSACHUSETTS LAW QUARTERLY will be for January, April, July and October instead of November, February, May and August as heretofore.

FRANK W. GRINNELL, Editor.

Entered as Second-Class Matter at the Post Office at Boston.



Public Document **No. 144**

ELEVENTH REPORT

OF THE

Judicial Council of Massachusetts

CREATED BY CHAPTER 244, ACTS OF 1924

(Now General Laws, Ter. Ed. Chapter 221, Sections 34A–34C)

NOVEMBER, 1935

(For Index see pages 4–5)

PUBLICATION OF THIS DOCUMENT APPROVED BY THE COMMISSION ON ADMINISTRATION AND FINANCE

2400. 12-'35. Order 5653

The Commonwealth of Massachusetts

NOVEMBER 30, 1935.

To His Excellency, JAMES M. CURLEY,

Governor of Massachusetts.

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the eleventh annual report of the Judicial Council.

T. HOVEY GAGE, *Chairman.*
FREDERICK LAWTON.
CHARLES THORNTON DAVIS.
WILFRED BOLSTER.
ARTHUR W. DOLAN.
CHARLES L. HIBBARD.
HERBERT B. EHRMANN.
FRANCIS R. MULLIN.

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ACTS OF 1924, CHAPTER 244

As amended by St. 1927, c. 293, and St. 1930, c. 142
Now appearing as G. L. (Ter. Ed.) Ch. 221, §§34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections:—*Section 34A.* There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of thirty-five hundred dollars.

MEMBERS OF THE COUNCIL

THOMAS HOVEY GAGE of Worcester, *Chairman*

FREDERICK LAWTON of Boston
WILFRED BOLSTER of Brookline
CHARLES L. HIBBARD of Pittsfield
HERBERT B. EHRMANN of Brookline
CHARLES THORNTON DAVIS of Marblehead
ARTHUR W. DOLAN of Boston
FRANCIS R. MULLIN of Winchester

FRANK W. GRINNELL, *Secretary*, 60 State St., Boston

ELEVENTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency

JAMES M. CURLEY,

Governor of Massachusetts

The Judicial Council was created by St. 1924, chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished and the results produced by that system and its various parts."*

In August of this year Francis R. Mullin, Esq., of Winchester, was appointed a member of the Council to succeed Frank W. Grinnell, Esq., whose term expired. In September William G. Thompson, Esq., died after serving as a member of the Council since 1931.

Introductory Remarks

As the problems of the judicial system are continuous we repeat the following opening passages from our tenth report in order to keep before the readers the right approach.

In the recent case of *Thayer* v. *Shorey* (287 Mass., page 76 at 80) Chief Justice Rugg said—

"The courts of the Commonwealth constitute a single system for the administration of justice in conformity to law promptly and without delay."

The second Report of the Judicature Commission in 1921, opened, by way of introduction, with the following quotation from Mr. Justice Riddell of the Supreme Court of Ontario:

"We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people. We cannot afford to waste either time or money."

These two quotations seem to furnish the sound standards to be kept in mind in studying our judicial system.

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*In 1925, the legislature also submitted the following request to the council.

1925 Resolves, Chapter 27

"Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and, among other things, the advisability of increasing or of wholly removing the ad damnum limits of district court jurisdiction in civil cases; measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights, trials without jury, including specifically an inquiry into the operation of the laws of Connecticut and Maryland relative to the waiver of jury trials in criminal cases; and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925)."

THE BROAD SCOPE OF THE PROBLEMS BEFORE THE COUNCIL

THE PROS AND CONS OF THE UNIFIED COURT PROPOSAL

Throughout our "continuous study—of the judicial system of the Commonwealth" these fundamental questions confront us: is our present time-honored judicial structure the best for our present needs; is there greater promise of efficiency in a unified court with specializing judges than in the present system of segregated specializing courts; is our present need more for a unified control of existing courts than for a unified court.

The problem suggested by these questions was discussed in the Second Report of the Judicature Commission (pages 22–25). *The Council is not yet prepared to make any recommendation in regard to it;* but its importance persuades us to present to the legislature, the courts and the bar arguments in favor of a unified court and objections to it, which have been called to our attention or have occurred to us in the course of our study. We begin with a statement of arguments presented to us in favor of unification and then state arguments presented to us against unification.

The Argument for Unification

Our present judicial system has resulted from the continued practice of creating new courts to meet new needs, a method termed "archaic" by Professor Pound.* In earlier days a few courts sufficed to handle the weightier matters of litigation. The rest, other than probate, were left to the very limited jurisdiction of justices of the peace, whose action was always subject to a general appeal. Our early judicial organization was largely influenced by the organization of English courts, the need of an American common law—"case law"—and the demand that justice be brought to every man's door in a community which was then preponderantly rural, and lacked the easy means of communication and transportation which we of today enjoy.** Maine was then a part of Massachusetts, and even here, what is now an hour's journey consumed a day. Fast trains, the automobile, the telephone and air mail have completely changed the picture. And the philosophy of the early nineteenth century was to restrict power in the hands of all those in office. Of administrative power, as a foundation for the prompt and economical despatch of judicial business, we read little. That need had not been felt. Moreover, a centralization of that power in the interest of efficiency and uniformity of judicial action, was impossible under earlier pioneer conditions.

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*Pound—Organization of Courts, *American Judicature Society Journal*, October, 1927.

**cf. National Economic League—Report of Committee on "Inefficiency in the Administration of Justice."

As the outcome of the method of creating new courts to meet new needs, we have now at least six types of courts, more or less specialized, not including sundry administrative tribunals which employ the judicial function. The functions of the justice of the peace, now lodged in the 73 independent district courts have expanded to such an extent that on the civil side their entries quadruple those of the superior court, to say nothing of about 25,000 "small claims" entered annually in the district courts. Both courts have final jurisdiction of fact. Both are subject to review on law by the supreme judicial court, and both have unlimited jurisdiction in point of amount. The civil trials in the Boston Municipal Court alone exceed those of the superior court for the entire state. All told, district court trials probably treble in number those tried in the superior court. And with our population shift from rural to urban, litigation has tended to centre in the cities. About half the superior court law entries are in Suffolk county. About 40 per cent of all the district court civil actions are brought in Suffolk county. Seven city courts, all but two of which are in the Metropolitan District, receive over 57 per cent of the civil writs entered in the 73 district courts. These trends have become most accentuated in the last one or two decades. And in both the superior court and the district courts, from the time when judicial statistics first began to be available, the quantity trend of litigation has been upward. Inevitably these changes have brought to the foreground the administrative aspect of judicial work, and the need of co-ordinated effort. How have we met that need? The supreme judicial court devotes itself almost wholly to revision and correction of past errors in individual cases. In the trial courts, we have a collection of more or less watertight compartments, each with its fixed staff, which give each other practically no help for want of power to help, a superior court in which the load apparently exceeds the man-power, causing congestion and delayed justice, and a group of district courts in which, as a whole, the man-power far exceeds the load, leading to all the evils which attend a system of part-time judges, and we have no efficient means of matching load and power. We have a system of independent courts, each engrossed with its own affairs, largely unaware of the effect of its action upon other branches of the court system. We have several courts attacking one and the same problem, without co-operation, as in the domestic relations muddle. We have an interminable line of statutes and decisions defining jurisdiction and venue which are largely waste motion and justice-thwarting, the sacrifice of the individual to the machine. We have groups of courts exercising identical functions, as in the district and probate court groups, with only a weak associative link afforded by advisory committees. Yet we hope for judicial uniformity. Our judicial system would be paralleled in the

business world by an organization without a general superintendent, comprising many departments whose heads never conferred, whose workmen seldom compared notes, who never helped each other out in time of stress, and who did the same thing in numberless different ways, each firmly convinced that his own way was best.

There is but one lasting remedy for such conditions—association with one's kind, operating under centralized control. In other words, unification of the system, transforming our independent courts into branches or divisions of one court. Such a change is not without precedent. The English Judicature Acts of 1873 and 1875 merged five appellate courts and eight courts of first instance, previously independent, into one divisional court. The rearrangement of the Federal circuit system is a step in the same direction. The same is true of the set-up of the Chicago Municipal Court. Until we have some rearrangement of our judicial system along similar lines, we shall not have co-ordinated effort working toward efficiency and economy, no group consciousness to make judges realize that each is a cog in one machine, no approach to uniformity in legal mandates and sanctions, no adequate means of matching load and power. Our present methods of piecemeal patching are only temporary palliatives. They do not reach the heart of the trouble. They meet a single situation as it becomes crucial, but they do not place the court system itself in a position to handle its own business to best advantage. Until that is done, full responsibility for results cannot justly be placed upon the courts.

For constitutional reasons, the Supreme Judicial Court will have to be left out of any present plan for unification. The plan still holds good for the trial courts. As to them, although an advisory opinion from the Supreme Court might be advisable, there would seem to be, under the decision in *Commonwealth* v. *Leach*, 246 Mass. 464, no reason why every existing separate judicial unit should not be given by legislation the same name, the same seal, a state-wide judicial territory, and judicial competence equal to that of all units combined, effecting unification of trial courts both in law and fact. This does not mean that courts are to be abolished, that specializing tribunals or the local magistrates are to disappear. It does mean that they are to function as parts of a whole, not each for itself alone.

As a basis for discussion, the following has been suggested as a divisional arrangement:

1. A civil jury division.

2. A jury-waived division, which will naturally be the largest of all in point of load, unless it turns out that more litigants claim jury in a single court than now surmount the small obstacle of a $3.00 removal fee. The chart in the council's tenth report shows a constant trend away from the jury trial.

3. An equity division.

4. A land division.

5. A probate division.

6. A domestic relations division, to include juvenile court functions.

7. A criminal division, sub-divided into jury and non-jury branches, and possessed of a sentence-revising department.

8. A small claims division. Elihu Root truly stated* that where one man handles both large and small matters, the latter tend to be neglected. And we should give up the idea that second-rate, ill-paid judges will serve for small matters. The correct determination of facts and the correct application of legal rules do not turn on the amount involved, and the social consequences of judicial error in this field of small claims are as large, if not larger, than in cases involving larger amounts. Unless our democratic pretensions are mere sham, this division should be well equipped judicially.

9. An appellate division, intermediate between all trial divisions and the court of last resort.

Each division should have its presiding justice, either appointed by the chief justice or elected by the division membership. Acting together, and with the chief justice, the presiding justices should determine, by rule, the business practice of the court and its several divisions, a function comparable to that exercised by the directors of a corporation. The court should, through its appellate division, construe its own rules, and with finality in all cases except those held to amount to a denial of justice. Contrary to common assumption, this does not necessarily include power to scrap the practice act or to repeal procedural rules legislatively ordained, like the due care statute. It does and should include the ordering of all matters of business detail. There is nothing revolutionary in this. The several courts have been making their own business rules for decades. In addition, the superior court makes its equity rules, the district courts make their small claims rules and their rules for appellate division procedure. The grant of power can be restricted at will, but we need a better terminology than "practice and procedure."

There should be a chief justice with large administrative power, including the power of assignment of judges and other officials to a division, and to a locality or district and to transfer them, temporarily or permanently, to another division or district.

It might be advisable to divide the judicial force into judges at large and district or county judges, to provide by rule for sessions, and to define the types of litigation cognizable by the various divisions. All this would mean a re-drafting of much of our statute

*Root—Addresses on Government, p. 185.

law. It is unlikely that present judges would do very different work from that which they now do, except that all would be full-time judges. This could be accomplished by making all standing district judges ex-officio masters and auditors. The special justice would largely disappear, for lack of assignment.

There is often an erroneous assumption that any unification of courts means a rotation or circuiting of judges. The real change is from specializing courts to specializing judges. No administrative head could wisely make a general practice of replacing a judge experienced in equity, real property, probate or criminal law, or in the art of jury trial or appellate procedure with one whose talents and training lay in a different field. On the other hand, there may be individual instances requiring the use of that power, which only differs in degree from that now given to chief justices. Neither does unification mean that because every judge has complete judicial competence, he is free to use it at will. It is to be assumed that both these matters will be wisely regulated by rule. The primary objectives of unification are two-fold, co-ordination through centralized control, and a system sufficiently flexible to allow the entire judicial power to be applied as varying needs arise so as to forestall or remove congestion points.

This is intended only as a bald outline. Many matters of detail would have to be filled in. Salary adjustments, a matter of legislative cognizance, would be a difficult detail.

Considering that the state is still part urban and part rural, it is clear that the local magistrate must be retained to a considerable degree, but it does not follow that his present methods of handling his business cannot be improved. This part of the judicial system is still full of variations in practice and methods which have no justifiable basis, and make for disrespect for law, because uniformity is thereby destroyed. Granting that there will be lack of uniformity as long as men differ, that is no reason against reducing it so far as possible. While difference in location may justify some variation, the larger bulk which now remains has no good reason back of it.

Finally, in the opinion of some, the logic of events will ultimately compel unification of trial courts, and, unless the experience of the past reverses itself, litigation will increase with time, and the larger the load, the harder the transition. And internal unification of the several parts of the trial system, good as far as it goes, gives little promise of relief for the worst congestion point, the superior court. The legislative breaking-down of jurisdictional barriers is the remedy there.*

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*Those who wish to study the matter further will find a bibliography in XI Illinois Law Review, No. 7. See also Annals of American Academy of Political and Social Science, Sept., 1935., pp. 100–114, "Our Shackled Judiciary."

Arguments Against the Unified Court

There is no magic in the term "unified." Unification is only a means to an end. Its purpose is to co-ordinate and integrate our judicial system and secure for it some centralized control which will compel co-operation and reasonable uniformity in practice and procedure. Although the Supreme Judicial Court says "the courts of the Commonwealth constitute a single system for the administration of justice," it is at present a system composed of units, which in many instances do not co-operate and which are not co-ordinated, and it never can be an efficient single system until there is a single administrative head to direct it. The question is how to bring that result about.

In Massachusetts, as elsewhere, the development of judicial systems under the common law has always been:

1. An appellate court to correct errors and abuses,
2. Trial court,
3. Local magistrates for the prompt and convenient handling of minor offences and smaller matters.

In this Commonwealth, as elsewhere, specialized courts, like probate, insolvency, juvenile, land, etc., have been instituted for the convenient handling of certain kinds of business. It is claimed that specialized courts, whether appellate, local or otherwise, become independent, arbitrary and conduct their affairs without recognition of the fact that they are but one cog in "a single system for the administration of justice." But the unified court, to which attention is called, will inevitably result in divisional judges more or less permanently assigned to the work to which they are best adapted. These divisional judges and the local magistrates who must be retained to handle local business, will probably develop just as many eccentricities and peculiarities as exist today, unless over the entire system there is a centralized control.

Moreover, if constitutional objections prevent the Supreme Judicial Court from being a part of the unified court of the Commonwealth, the proposal only goes half way. The court, which has the last word and to which the whole system must bow, stands outside and independent and some of the difficulties under which we now labor would persist. A unified control is much more needed than a unified court and a unified control to manage our judicial system as a single unit must come from the department authorized to exercise it.

A unified court means one trial court in which of course jury trials must be held. The experience of the Superior Court seems to show that most litigants in a court where jury trials can be had claim it, sometimes for good reasons, but more often for annoyance and delay. It is claimed in cases where the amount involved is entirely

disproportionate to the expense to the public and which should never have been brought in that court. This state of affairs has resulted in the unfortunate congestion in that court to which we have given in the past much consideration. All that we have gained in recent years in encouraging the use of the District Courts will be lost if litigation is put back into a court where jury trials can be claimed in every case.

The claim is made that a uniform court is more flexible; that a case can be at once sent to the division best adapted to handle it and that judges can be moved to meet the changing load of business.

But under our present system there seems to be no reason against a wide extension of the right to transfer cases which now exists from the Supreme Judicial Court to the Superior Court and from the Superior Court to the Land Court.

Nor does there seem to be any reason why further provision for the transfer of judges cannot be made, similar to the existing right of the Superior Court to call upon District Court judges to sit in misdemeanor cases.

Increased jurisdiction in certain courts and the power in some administrative head to transfer judges would effect all that is claimed for a unified court. But neither a unified court, nor the power to transfer cases and judges under our present system will amount to much unless there is lodged somewhere a central administrative control.

It is also said that at least one of our courts is and must remain a specialized court and will not fit into any scheme of unification. A large part of the work of the Land Court is registration of titles; this is a proceeding *in rem*. The determination of controversies between parties is purely collateral. The proceeding begins with a judicial investigation, by the court itself, into the title. Service of personal process is by registered mail. The registers of deeds in their various districts, elective officers,and most of them not lawyers, are the assistant recorders of the court, through whom the court acts and in whose registries the records of the court are kept. The official report of the examiner is accompanied by a full abstract of title. Plans from actual surveys are required to be filed, and official plans accompany, or are referred to in, all decrees and certificates of title. The court has an engineering force of its own, co-operating with other engineering departments both state and federal, an important part of its judicial machinery, wholly foreign to that of any of the other courts. Unlike any of the other courts, the Land Court sits wherever public convenience may require, often borrowing local district court rooms for the purpose. There is no waiting for the next local sitting of the court. All cases are specially assigned. It has no general trial list, and there is no congestion, which is the great evil sought

to be remedied by the proposition in question. Speedy hearings within a few weeks can always be had. None of the above features can well be administered from the central control of courts of general sessions.

The Supreme Judicial Court is now authorized to "superintend" our judicial system. We have two examples of courts under a more or less centralized control. The chief justice of the Superior Court and the chief justice of the Municipal Court of the City of Boston, with their power to provide sittings and assign justices, exercise a large measure of control over their respective courts. We have provided administrative committees for the District Courts and the Probate Courts. If these committees, or some other similar authority, could exercise over those courts the same control that the two chief justices exercise in their Courts, all the courts of the Commonwealth would be under a responsible executive management and if present methods of transferring cases and judges were extended by appropriate legislation, the Supreme Judicial Court would then be in a position to establish conferences with the responsible heads of the other courts and bring about the centralized control, which is the real objective of the unified court idea.

The Supreme Judicial Court must not be overloaded with work or responsibility. If that court adopted the practice of the New York Court of Appeals, which in 1934 wrote opinions in only about 30 per cent of the cases submitted, and were content with memorandum decisions in the rest, it would be relieved of much labor. It is doubtful if in every case the parties are as much concerned with reasons as with decisions. A very, very small per cent of cases actually tried in the courts of the Commonwealth ever reach the Supreme Judicial Court. In all the rest litigants seem to be content without any opinion, or with the briefest sort of memorandum by a trial judge.

The judicial system in Massachusetts has grown up through a consistent development of three hundred years in accordance with the needs of its people. No foreign system has ever been imported, adopted or adapted. Methods of doing business, of self-government, of defining and punishing crime and of the enforcement of civil rights and obligations have been created by, and adjusted to, the needs of our own people. This has been accomplished under the guidance and regulation of the decisions of the Supreme Judicial Court through 287 volumes of its reports. There is no necessity for the creation of a new system, the creation of new courts or the abolition of any of those now existing. There is need of better business administration and of centralized control.

In the rural districts the existence of small local courts with magistrates familiar with the local business methods, traditions

and character of the neighborhood is of vital importance to the administration of local justice, especially as regards petty crimes and misdemeanors. Power to assign cases for trial, and judges to sit, in any court within a given territory should be vested in the Administrative Committee or in some centralized control over all trial courts of general jurisdiction.

If we are unable to secure some sort of integration and co-operation in our District and Probate Courts through their respective administrative committees, there would seem to be small chance of success in the more pretentious effort to weld into one unified court the Superior, District, Land and Probate Courts.

PRACTICE BY OFFICIALS OF DISTRICT COURTS

While this report was in press, the Supreme Judicial Court, in the exercise of its general powers* promulgated the following rule:

"Rule Relative to Administration of Justice

At the Supreme Judicial Court holden at Boston in and for said Commonwealth on the seventh day of December in the year of our Lord one thousand nine hundred and thirty-five, it is

Ordered by the Justices of the Supreme Judicial Court, beginning with the fifteenth day of January, in the year of our Lord one thousand nine hundred and thirty-six, that no justice, special justice, clerk or assistant clerk of a district court shall be retained or employed or shall practise as an attorney on the criminal side of any court in the Commonwealth.

ARTHUR P. RUGG, *Chief Justice.*
JOHN C. CROSBY
EDWARD P. PIERCE
FRED T. FIELD
CHARLES H. DONAHUE } *Justices."*
HENRY T. LUMMUS
STANLEY E. QUA

This rule deals with a matter which has been the subject of public discussion in the press and before the legislature for some years.** Commissions appointed by the legislature, the Judicial Council, and the Administrative Committee of the District Courts, have all approved the principle underlying this rule.

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*See G. L., c. 211, s. 3, and Advisory Opinion of the Justices, 279 Mass. 607.

**cf. Second Report of Judicature Commission, pp. 52-53 (Mass. Law Quart., Jan. 1921); Third Report of Judicial Council, pp. 71-72 (M. L. Q., Nov. 1927); Report of "Crime Commission," Senate 125 of 1934, p. 125 (M. L. Q., Jan. 1934); Report of Public Expenditures Com. Senate 250 of 1934, p. 37; Ninth Report of Judicial Council, pp. 31-32 (M. L. Q., Nov. 1933); Tenth Report of Judicial Council, pp. 19-20 (M. L. Q., Nov. 1934); Governor Curley's inaugural address in January, 1935, and special message in July, 1935.

JURORS AND JURIES

In our Ninth and Tenth Reports we called attention to the fact that something should be done to improve the quality of jurors and suggested that the experiment of a jury commissioner be tried out in the Metropolitan District. We renew the suggestion. Other communities, like Cleveland and Detroit, are forging ahead of us in their determination to improve the jury system.

We have not favored the proposition to have juries of six in the district courts. There are no accommodations for them and they would slow down the business of those courts and bring about a situation like that in the Superior Court; but we suggest to the legislature for its consideration whether something could be gained in economy and dispatch of business in the Superior Court if the number of jurors could be fixed at less than twelve.

In connection with the subject of the cost of the administration of the courts the question of recommending a constitutional amendment reducing the number of jurors, in civil and criminal cases except capital cases, or authorizing the legislature to fix a number of jurors less than twelve in such cases, has been considered. It seems to us that this subject matter should be called to the attention of the legislature.

In the Fourth and Fifth Reports of the Judicial Council statistics are given as to the average verdicts in civil cases tried in the Superior Court. From these statistics it appears that in 1925 in 50 per cent of the cases tried there were verdicts for the defendant, that in the remaining cases 50 per cent of the verdicts were for $500 or less; in 13 per cent were not in excess of $1,000; in 30 per cent were from $1,000 to $5,000, and in 7 per cent over $5,000.

Approximately a million dollars is paid out annually in the Commonwealth for the servicesof jurors.* By a reduction of the number of jurors in civil cases to not more than eight, a saving of over $300,000 would be made annually. A jury of six would save about a half million dollars annually. Apart from the requirements of our constitution, the legislature might well believe that civil actions and criminal except capital cases could as well be tried by a jury of eight or six as by a jury of twelve. Cases of far greater moment not only involving far larger sums but also serious consequences in human relations are tried daily without a jury. In such matters as the probate of wills, partition of real estate and instructions of fiduciaries frequently involving title to very large interests, there is no constitutional right of jury trial. In none of the various other probate proceedings, many of which may give greater concern to litigants than the gain or loss of money may jury trial be had. That jury issues be framed in will cases is not a constitutional right. There is no constitutional right to jury trial in equity as to matters

*See Table, seventh report of Judicial Council, page 16.

pertaining to equity jurisprudence, as generally understood in England and Massachusetts at the time of the adoption of the constitution. See *Commissioner of Banks* v. *Harrigan* A. S. 1935, p. 1851. Most difficult and far reaching cases such as the suits in equity against directors of banks or other corporations are tried in equity without a jury.

The constitution of the United States relative to trial by jury imposes no restrictions upon the several states but only upon the government of the United States. It has no application in this respect to the law of the several states. See *Commonwealth* v. *Whitney*, 108 Mass. 5-7.

The constitution of Utah (1895, Art. 1, sec. 10) provides that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors." In *State* v. *Bates* (1896) 47 Pac. Rep. 78, it was held that constitutional provision for trial of criminal cases by a jury of eight was not in violation of the Federal Constitution.

Under our constitution the jury must consist of twelve men, as it has been commonly held that by a jury, the common law jury of twelve is intended, unless the constitution otherwise provides.

The constantly increasing cost of government is one of the greatest problems with which the state and the various municipalities are today concerned. This may be an opportunity, at a time when most needed, to make a contribution to economy without sacrifice of efficiency. Possibly six or eight men can pass as well as twelve men on the questions of fact tried in our Superior Court, involving as before pointed out, verdicts for the defendant in 50 per cent of the cases; verdicts of $1,000 or less in 63 per cent of the remaining cases, and verdicts of over $5,000 negligible.

We recommend that the general subject of submitting to the people a constitutional amendment authorizing the legislature to fix the number of jurors in civil and criminal cases except capital cases at less than twelve, be given the serious consideration of the legislature. Such an amendment could well go hand in hand with any legislation aimed at improving the quality of jury service.

NEW PROCEDURE IN THE SUPERIOR COURT

During the past year, the Superior Court has inaugurated one of the most advanced improvements in the administration of that court that have been made since the creation of the court in 1859. In February of this year, Mr. Justice Cox and Edmund S. Phinney, Esq., the executive clerk of the Chief Justice of that court, were sent by Chief Justice Hall to study the systems of administration in Cleveland, Detroit, and in the courts in New York especially in connection with a central jury room for all sessions and with the settling of issues before trial, handling of trial lists and engagements of counsel. An account of the practice in Detroit, by Mr. Justice

Cox, was printed in the *Massachusetts Law Quarterly* for May, 1935 (pages 8-10), in the *Law Society Journal* for May, 1935 (pages 641-643) and in the *Bar Bulletin* for June, 1935 (pages 1-3).

Following their study of the methods in other cities, experiments largely based on the Detroit practice and adapted to our local situation, were begun in the Superior Court in Suffolk County. The pooling of jurors in the Suffolk County Court House in one central room was started in May, and the pre-trial procedure was begun by Judge Gray on August 26th.

Jury Pooling

From the figures available, it appears that for the 7 months in 1935, in which the jury pooling has been in operation, compared with the same period in 1934 there has been a saving of over forty thousand dollars.

The Pre-trial Session

In June, 1935, the court issued a notice to the bar announcing a new practice to begin on August 26th, for a "pre-trial call of list of jury cases for the week," a "new method of handling the jury list in Suffolk" and new directions in regard to the "lists for sessions without jury and the so-called A Sessions." A copy of this notice, for convenient reference and for the information of those who are not familiar with it, will be found in Appendix A of this report.

At the pre-trial hearings, there is a general discussion of issues involved, agreements are reached on particular facts to avoid calling of unnecessary witnesses and, by getting the lawyers together with the judge, the case is either settled or put in more definite shape for trial than has been possible heretofore. At this hearing, the court also discusses with counsel the question whether they really want a jury trial. From the results of the pre-trial call, a list of cases which are to be ready for trial is made up and sent to counsel. In each of these cases, counsel are entitled to receive two notices by telephone from the list clerk. New quarters were assigned to the list clerk; additional telephones installed and blackboards showing the cases on trial in the several sessions and their progress. The day before the case is held for trial, each counsel is notified to be ready and when the case is actually reached he receives another telephone notice at least fifteen minutes before he is needed in court. By this method, much of the time of counsel and witnesses formerly wasted in waiting at the court house has been saved. All requests for continuance, or delay of trial must be made at the pre-trial call and no continuance afterwards is granted except for cause thereafter arising and not due to the fault of parties or their counsel.

While it is impossible to give an exact comparison in numbers in regard to disposition of cases under the old system, the approximate estimate of the effect during the first three months and a half of the

experiment is that, while under the old system about 1100 cases were disposed of in that period, under the new about 1500 cases have been disposed of, i.e., an increase of about 400 cases.

Of the cases disposed of, there were 774 cases which were settled between August 26th, and December 5th, as a result of the pre-trial hearing.

In about 100 cases, the parties decided to waive a jury and go either to the general list for jury-waived cases or in the so-called "A" session, in which the parties know what judge is to sit before they decide to waive a jury. Most of these cases have been of contract or of some unusual form of tort case which, because of the complication of issues or for some other reason, would have resulted in much longer trials before a jury than before a judge.

There were in the period mentioned about 200 non-suits and defaults in the pre-trial hearing. While many of these were later removed for cause, about one-half of them were final dispositions.

We are informed that the co-operation of the bar and of the clerks of the court in the new experiment has been marked and has assisted the court greatly in putting it into effect. Thus far the court has conducted the pre-trial session in connection with the motion session, but, after the first of the year, the pre-trial session is to be a full time session as far as it is needed.

The new system of lists has also materially reduced the cost of printing.

It is obvious, therefore, that the experiment has been well warranted by results and with the knowledge gained from experience gives promise of increased effectiveness in bringing about more just results in litigation, in reducing congestion and avoiding delays, waste of time of counsel, witnesses and of the court and every one concerned. These experiments illustrate forcibly the value of the study by the courts and the bar of practice and procedure in other jurisdictions.

We congratulate the Superior Court on this marked step in advance.

Auditors in Tort Cases

Paralleling this pre-trial work, the court in different counties has also sent many tort cases to auditors during the past year with apparently successful results and thus has brought about a final disposition in most of these cases without a trial in court. The court, in Suffolk at least, has adopted the general practice of reserving contract cases for trial in court, instead of sending them to auditors and sending out the tort cases, which take less time for trial before an auditor, thus disposing of them more promptly. This practice is reflected to a marked degree in the table showing the references to auditors and masters over a series of years, and for the first nine months of 1935.

THE NEW FORM OF SUMMONS IN ACTIONS AT LAW

In our ninth report we referred to the fact that we had recently submitted to the Supreme Judicial Court for consideration under General Laws, chapter 223, section 16, a revised form of summons to be used in civil law cases.

The second report of the Judicature Commission* called attention to the fact that writs and summonses ought to state more accurately what the person served is required to do and to give intelligible information to a layman who, if he does not consult a lawyer, may be misled by the summons to appear in court when he is not wanted.

The second report of the Judicial Council** called attention also to the fiction of the so-called "chip" attachment and explains the history of that fiction.

The Supreme Judicial Court, acting upon these suggestions, has, by rule effective November 30, 1935, changed the form of the separate summons to be used with writs of summons and attachment (see copy in footnote†). This new form is designed to accom-

*Page 115, reprinted in Massachusetts Law Quarterly for January, 1921.

**Pages 37 and 43, reprinted in Massachusetts Law Quarterly for December, 1926.

†**Commonwealth of Massachusetts**

General Rule Regulating Change in Form of Separate Summons To Be Used With Writs of Summons and Attachment as Required by Statutes

At the Supreme Judicial Court holden at Boston in and for said Commonwealth on the thirtieth day of October in the year of our Lord one thousand nine hundred and thirty-five, it is

Ordered by the Justices of the Supreme Judicial Court, beginning with the thirtieth day of November in the year of our Lord one thousand nine hundred and thirty-five, in pursuance of General Laws (Ter. Ed.) Chapter 223, section 16, that the form of separate summons to be used with writs of summons and attachment, as required by the Statutes shall be amended so as to be in the form hereto annexed.

ARTHUR P. RUGG, *Chief Justice*
JOHN C. CROSBY, EDWARD P. PIERCE, FRED T. FIELD, CHARLES H. DONAHUE, HENRY T. LUMMUS, STANLEY E. QUA — *Justices*

Separate summons, to be used with writ of summons and attachment, as required by General Laws (Ter. Ed.) Chapter 223, sections 17, 18, 29, 30.

Commonwealth of Massachusetts

SS. Court.

(Seal of Court)

To C.D. of within our County of

Whereas A.B. of within our County of has begun an action of against you by writ dated 193 and returnable in the Court holden at within our County of on the day of 193 in which action damages are claimed in the sum of dollars as follows:

(nature of claim) (note 1)

as will more fully appear from the declaration to be filed in said Court when and if said action is entered therein:

WE COMMAND YOU, if you intend to make any defense to said action, that on said day of or within such further time as the law allows, you cause your written appearance to be entered and your written answer or other lawful pleadings to be filed in the office of the Clerk of the Court to which said writ is returnable, and that you defend against said action according to law.

Hereof fail not at your peril, as otherwise judgment may be entered against you in said action without further notice.

Your goods or estate have been attached as security to satisfy any judgment which may be recovered against you in said action. (note 2.)

Witness Esquire at the day of in the year of our Lord one thousand nine hundred thirty

Clerk.

Note 1. The nature of the claim should not be limited to the words "contract" or "tort" but should be specified as "for goods sold" or "assault," or "for rent," or some other simple words.

Note 2. If no actual attachment is directed to be made, the statement that goods and property have been attached should be crossed out.

plish three results: (first) it tells the person upon whom it is served what he must do; (second) it tells the defendant the nature of the claim against him; and (third) if no actual attachment is made the statement in the summons that his goods or estate have been attached is stricken out, thus abolishing the fiction of a "chip" attachment. A "chip" attachment is not an "actual" attachment. (See Howe's Practice (1834) page 61; Colby's Practice (1848) 109; *Peabody* v. *Hamilton*, 106 Mass. 217).

This form of summons together with the revised form of trustee process necessitated by Chapter 410, 1935, is a step towards the simplification and intelligibility of legal process.

In our Tenth Report we made "The District Courts" one of our principal subjects. We gave the results of our study theretofore made and stated that we should continue these studies. We have done so. Although we have given much time and thought we have not yet reached a conclusion as to any broad or fundamental change. Until we can develop such and recommend them with assurance, it seems wise to us to continue our policy of orderly development in matters of practice and procedure in these courts. The following recommendations cover the results of our study of this aspect of our judicial problem.

LIMITED EQUITY JURISDICTION FOR THE DISTRICT COURTS

As a result of the recent statutes giving the District Courts unlimited jurisdiction, concurrent with the Superior Court, in actions at law, the business of the District Courts has increased. If a plaintiff cannot discover property of a defendant which he can attach at law, but knows of property which can be reached in equity, he must bring his bill in the Superior Court. These bills to "reach and apply" are the commonest form of equitable procedure. We think the time has come when the District Courts should be allowed to entertain these bills, which are really actions at law brought on the equity side of the court for the sole purpose of reaching property which can not be attached. In many counties there is not a Superior Court judge available for the prompt handling of these cases and we believe it will be a great convenience to litigants and the bar if the district courts are given this limited equitable jurisdiction. For the same reasons, we think the district courts should be given jurisdiction in suits under clause 1 of section 3 of chapter 214, commonly known as equitable replevin for the redelivery of chattels to which the plaintiff is entitled. When equity jurisdiction was extended to the Superior Court by St. 1883, chapter 223, a provision was inserted for removal and we think a somewhat similar right of removal should be given. Accordingly, we have so provided in the draft act below.

Much might also be said in favor of giving the district courts jurisdiction in bills for specific performance of contracts. We commend this suggestion* to the consideration of the legislature; but it has seemed, on the whole, wiser to begin with the limited jurisdiction in bills to reach and apply and equitable replevin which only makes the district courts more efficient to deal with matters already within their jurisdiction on the law side.

The procedure and practice and forms can, in our opinion, be best adapted to district court use by rules made by the district courts subject to any general rules which the Supreme Judicial Court may in its discretion promulgate for the guidance of these courts. The general practice in equity, the forms of pleading attached to the act of 1883 referred to, and the proceedings in equity in the probate courts are readily available as a basis to guide the district courts in framing their own rules. We submit the following draft act.

Draft Act Extending Limited Equity Jurisdiction to the District Courts

Section 1. Chapter two hundred eighteen of the General Laws as appearing in the Tercentenary Edition is hereby amended by inserting after section nineteen the following new sections:

Section 19A. District Courts shall have original jurisdiction in equity concurrent with the Supreme Judicial and Superior Courts under clauses (1) and (7) of section three of chapter two hundred fourteen of the General Laws.

Section 19B. The foregoing suits in equity shall be brought in a District Court in the county where one of the defendants lives or has his usual place of business and in a court within whose judicial district one of the parties lives or has his usual place of business, provided that if one of the defendants in any such suit lives in Suffolk County such suit may be brought in the Municipal Court of the City of Boston.

Section 19C. The provisions as to waiver of jury trial in Section 102A of chapter two hundred thirty-one shall apply to suits under this act. If any defendant in a suit in equity in a District Court within ..... days after the day for appearance or if the plaintiff in such a suit in which a claim in set-off or counter claim is filed within the time allowed him by rule for filing an answer to such claim in set-off or counter claim files a request in writing that the cause be transferred to the Superior Court for hearing or for trial with jury, if there is a right to such trial, together with the fee for entry of the cause in the Superior Court, it shall be immediately transferred with the papers and entry fee therein to that court and the cause shall proceed as if originally instituted in that court. But before such removal, the District Court may make such orders as are needful

*The jurisdiction of specific performance, however, is not specifically mentioned in Chapter 214, but comes under the "general principles of equity jurisprudence" referred to in Section 1 of Chapter 214 as the test of general equity jurisdiction. The seller in a contract to convey land becomes in equity a trustee for the buyer and specfic performance is to enforce the trust contained in the terms of the contract which otherwise would be merely a basis for damages in a suit at law. If the legislature should decide to include this subject in the proposed act a special section should be added as follows:

"The district courts shall also have such original and concurrent jurisdiction of suits for specific performance under the general principles of equity jurisprudence."

for the protection of the rights of the parties until the suit is heard or tried by the Superior Court; subject, however, to be modified or annulled by order of that court on motion after suit has been transferred as aforesaid. (Cf. St. 1883, c. 223, § 8 and St. 1934, c. 387, § 3.)

Section 19D. The justices or a majority of them of all the District Courts except the Municipal Court of the City of Boston shall make uniform rules applicable to said courts and the justices of the Municipal Court of the City of Boston shall make rules applicable to that court, governing the procedure, forms and practice for the exercise of jurisdiction under this act including such provisions, if any, as may seem advisable for the separation of equitable issues from issues at law and, including also proceedings for rehearing through the appellate divisions of said courts. There shall be no general appeal, but questions of law arising in proceedings under this act shall, at the written request of a party claiming to be aggrieved, be reported to the appellate division as a case stated for review thereafter in accordance with sections one hundred eight, one hundred nine and one hundred ten of chapter two hundred and thirty-one, which shall govern such reviews so far as applicable under rules to be made as aforesaid.

Section 2. Section 19D relative to the making of rules shall take effect forthwith on the passage of this act. The remainder of the act shall take effect on the first day of....., 1936.

SEPARATE SUPPORT AND CUSTODY OF MINORS WHOSE PARENTS ARE LIVING APART BUT NOT DIVORCED

We recommend that the jurisdiction of separate support proceedings under General Laws, chapter 209, section 32, and of petitions under section 37 for custody of minors whose parents are living apart but not divorced be transferred from the probate to the civil side of the district courts. We are convinced that the probate courts are hampered in the administration of these proceedings by lack of proper machinery, which in fact exists in the district courts, and that the burden of the cost of duplicating such machinery in the probate courts should not be put upon the taxpayers.

The jurisdiction in separate support is closely bound up with the criminal jurisdiction in non-support cases. Conflicts between separate support proceedings in the Probate Court and non-support cases in the district courts are inevitable. The existence of the civil proceeding has in a number of instances caused some district court judges to refuse complaints in non-support cases. In most of the separate support proceedings, a large percentage, in fact almost all, of the parties concerned are in humble and frequently very poor circumstances. Many of them cannot afford to pay for process or services of attorneys. In many cases the conditions are such that no order for support can be made, and the only relief given is as to custody and adjudication of living apart for justifiable cause. The latter is of importance that the wife may eject the irresponsible husband and keep him from the home and in some

instances to obtain rights to convey, make wills, etc., as if sole. To accomplish this in many counties the wife is compelled to travel a long distance to the county seat, which she can ill afford, and this with a local court in her own community or conveniently near.

In the cases in the probate courts where orders for payment of support are made, but not lived up to, the only remedy is by contempt proceedings. If the husband fails to appear in these cases and capias is issued, the wife in want is put to expense for the apprehension of the husband. When he is finally brought before the probate court, the wife most frequently produces no witnesses. She cannot afford to summon them. Thus the court is not properly informed. The husband says he is out of work; the wife says he is working. The husband says he is paid up; the wife says he is not. As the probate courts have no official to whom payments are made by the husband in such proceedings, no one to visit alleged employers, no one to seek to obtain employment for the husband, they are in a somewhat helpless position. If the court is satisfied, however, that the man could have paid, the only remedy is to commit him to jail. If he be committed, the object of the proceedings is defeated in most cases. The wife and children get nothing; in jail he cannot seek employment. The situation breeds disrespect for the courts. The rank and file of people credit the courts with potency. The wives ask the judges, "What are we going to do?" If the court recommends criminal prosecution under which, if the husband be committed, the county may be ordered to pay so much a day for the support of the wife and children, two difficulties arise; first, some wives are averse to going to the criminal courts with their children; second, some district courts are reluctant to act where orders have been made in the probate court and which have proved ineffective, notwithstanding express legislation that such civil orders shall not be a bar to prosecutions for non-support.

In non-support cases hundreds of thousands of dollars are collected annually by probation officers in district courts. There are almost two hundred probation officers serving the district courts of Massachusetts. The existence of this body of investigators presents an admirable opportunity for service in these classes of cases which are really neighborhood matters; best dealt with where the parties live. The splendid work done by probation officers in non-support cases should be extended to separate support and the custodial cases under General Laws, chapter 209, sections 32 and 37.

The recent fifth report of the Judicial Council of Michigan points out that in Wayne County the "Friend of Court," who has 47 "assistant friends of court" under him, collected over $900,000 in 1934 under alimony and maintenance orders. The entire subject of separate support is in the jurisdiction of the Magistrates' courts

in England. Investigation is at the bottom of the success with which such matters are dealt with there. One eminent authority in England, because of the results in these cases in the Magistrates' Courts, is of opinion that the jurisdiction in divorce should likewise be conferred on those courts. We are not prepared to recommend the transfer of the divorce jurisdiction to the district courts. It may be that at some time in the future the subject of separate support and non-support should be considered with a view to a uniform system as in England, embracing that which is best in both. We believe, however, that any such study should follow the experience to be gained in the district courts in the exercise of the dual jurisdiction if the recommendation for transfer of proceedings herein made, is adopted by the legislature.

We recommend the passage of the following act:

Draft Act to Transfer Jurisdiction of Separate Support Proceedings and Certain Proceedings as to Custody of Minors to the Civil Jurisdiction of District Courts

Section 1. Section thirty-two of chapter two hundred and nine of the General Laws as appearing in the Tercentenary Edition, is hereby amended by striking out the words "the probate court" in line five and by inserting in place thereof the words "a district court"—so as to read as follows:

Section 32. If a husband fails, without justifiable cause, to provide suitable support for his wife, or deserts her, or if the wife, for justifiable cause, is actually living apart from her husband, or if the husband is deserted by the wife, or is actually living apart from his wife for justifiable cause, a district court may, upon his or her petition, or if he or she is insane, upon the petition of the guardian or next friend, prohibit the husband or wife from imposing any restraint on the personal liberty of the other during such time as the court shall by its order direct or until the further order of the court thereon; and, upon the application of the husband or wife or of the guardian of either, the court may make further orders relative to the support of the wife and the care, custody and maintenance of their minor children, may determine with which of their parents the children or any of them shall remain and may, from time to time, upon a similar application, revise and alter such order or make a new order or decree, as the circumstances of the parents or the benefit of the children may require.

Section 2. Section 32A of chapter two hundred and nine of the General Laws as appearing in the Tercentenary Edition, is hereby amended by striking out the word "judge" in the eighth and eleventh lines and by inserting in place thereof the word "justice"—so as to read as follows:

Section 32A. If in any proceedings under section thirty-two, adultery or any other specific criminal act with a third person is alleged in the petition, answer or in any bill of particulars or specifications, or if any allegations are made in such pleadings which would be derogatory to the character or reputation of a third person, if named therein, the pleadings shall not contain the name of such third person. The party making such allegations may, at any time after filing the pleadings containing the same, upon an ex parte hearing before a justice of the court in which the proceedings are pending, obtain permission to amend such

pleadings by inserting the name of the person concerning whom the allegations are made, if the justice finds probable cause has been shown that such allegations are true; and thereupon the pleadings may be amended accordingly and notice of such amendment shall be sent to all parties interested.

Section 3. Section 32B of chapter two hundred and nine of the General Laws as appearing in the Tercentenary Edition, is hereby amended by striking out the word "register" in the fourth and eighth lines, and by inserting in place thereof the word "clerk"—so as to read as follows:

Section 32B. The evidence produced at such ex parte hearing shall not be reported or made a part of the record in the case, and the motion for said amendment shall not be read in open court during the proceedings, but the clerk shall make an entry in the docket of "Motion to insert name of third person allowed," or "Motion to insert name of third person denied," as the case may be. If the amendment is allowed upon affidavits, they shall be retained by the court and placed in the custody of the clerk, and shall be open for the purposes of inspection and taking copies thereof to counsel of record, the parties or the third person named in the amendment.

Section 4. Section thirty-three of chapter two hundred and nine of the General Laws is hereby amended by adding at the end thereof the following: "In such proceedings an attachment may be made by injunction as in suits in equity to reach shares of stock or other property which cannot be reached to be attached as in an action at law, and the property so attached shall be subject to such order as justice and equity may require; and in relation to such proceedings said courts shall have all the powers which the Supreme Judicial and Superior Courts have in relation to bills to reach and apply."—so as to read as follows:

Section 33. Upon such petition, an attachment of the husband's property may be made as upon a libel for divorce; and sections seventeen, thirty-three, thirty-five and thirty-eight of chapter two hundred and eight shall apply to proceedings upon such petition and to all subsidiary proceedings arising thereunder, so far as appropriate. In such proceedings an attachment may be made by injunction as in suits in equity to reach shares of stock or other property which cannot be reached to be attached as in an action at law, and the property so attached shall be subject to such order as justice and equity may require; and in the relation to such proceedings said courts shall have all the powers which the Supreme Judicial and Superior Courts have in relation to bills to reach and apply.

Section 5. Section thirty-four of chapter two hundred and nine of the General Laws is hereby amended by striking out said section and inserting in place thereof the following section:

Section 34. A petition under section thirty-two may be brought in the judicial district where either of the parties lives, except that if the petitioner has left the district where the parties have lived together and the respondent still lives therein, the petition shall be brought in that district.

Section 6. Section thirty-six of chapter two hundred and nine of the General Laws as appearing in the Tercentenary Edition, is hereby amended by striking out said section and inserting in place thereof the following section:

Section 36. If a court having jurisdiction has entered a decree that a married man has been deserted by his wife, or is living apart from her for justifiable cause, he may convey his real estate in the same manner and with the same effect as if

he were sole; and the surviving wife shall not be entitled under section fifteen of chapter one hundred and ninety-one to waive the provisions of a will made by him or to claim such portion of his estate as she would take if he had died intestate, nor, shall she be entitled upon his death, if he leaves a will, to dower in his estate, as provided in section one of chapter one hundred and eighty-nine.

(*Note:* The husband may procure a decree under section 32 that he has been deserted, etc., and in such case the proposed section 36 gives to that decree the effect which section 35 gives to such a decree if made in favor of the wife under section 32. When the present section 36 was passed, the husband could not get such a decree under section 32. Under the proposed act the rights of both husband and wife are treated in the same manner. Each may apply under section 32 and the consequences of any decree made under section 32 are set up in section 35 and the new section 36.)

Section 7. Chapter two hundred and nine of the General Laws is hereby amended by inserting after section thirty-six as amended by this act, the following new section:

Section 36A. Upon the entry of such a decree as is referred to in section thirty-five and section thirty-six of this chapter as amended by this act, the clerk of the district court in which such decree has been entered shall transmit to the register or registers of probate for the county or counties in which the parties live a certified copy or copies of said decree, who shall enter, index and record the same in said probate court or courts as the case may be. A copy or copies of any decree revoking such a decree shall likewise be transmitted to the register or registers of the proper Probate court or courts for entering, indexing and recording, in the same manner as herein provided for the transmission of a copy or copies of the original decree on said subject matter.

Section 8. Section thirty-seven of chapter two hundred and nine of the General Laws, is hereby amended by striking out the words "the probate court for the county" in line two and by inserting in place thereof the words: "the district court for the district"—and striking out the words "superior court has" in line seven and by inserting in place thereof the words "superior court and the probate court have"—so as to read as follows:

Section 37. If the parents of minor children live apart from each other, not being divorced, the district court for the district in which said minors or any of them are residents or inhabitants, upon petition of either parent, or of a next friend in behalf of the children after notice to both parents, shall have the same power to make decrees relative to their care, custody, education and maintenance and to revise and alter such decrees or make new decrees, as the superior court and the probate court have relative to children whose parents are divorced.

Section 9. Chapter two hundred and nine of the General Laws is hereby amended by adding after section thirty-seven the following new sections:

Section 38. In proceedings under section thirty-two or thirty-seven of chapter two hundred and nine as amended by this act, a district court may direct the probation officer or any assistant probation officer of said court to investigate the facts. Said officer shall before final decree report in writing to the court the results of the investigation and such report shall be open to inspection to all the parties or their attorneys. The state police and local police shall assist such officer upon his request.

Section 39. If a case under section thirty-two or thirty-seven of chapter two hundred and nine as amended by this act is within the jurisdiction of two district courts, the court first taking cognizance thereof by the commencement of proceedings therein shall retain jurisdiction thereof, and shall exclude the original jurisdiction of any other district court.

Section 40. If it appears before final decree in any proceeding in a district court under sections thirty-two and thirty-seven of chapter two hundred and nine as amended by this act, that said proceeding was brought in the wrong district or that by reason of change of residence of either or both of the parties, or otherwise, said proceedings can be dealt with more justly or conveniently in another district, said court may order the proceeding and all papers relating thereto to be removed to the district court for the proper district, and it shall thereupon be entered and pending in the last mentioned court as if originally commenced therein, and all prior proceedings otherwise regularly taken shall thereupon be valid.

Section 41. There shall be no general appeal from orders or decrees made under sections thirty-two or thirty-seven of this chapter as amended by this act. Questions of law arising under this procedure shall, at the written request of a party claiming to be aggrieved, be reported to the appellate division as a case stated. Thereafter the review shall proceed in accordance with the provisions of chapter two hundred and thirty-one, sections one hundred and eight, one hundred and nine and one hundred and ten as most recently amended, so far as the same are applicable, and rules made therefor.

Section 42. The pendency of proceedings for legal review shall not suspend or stay proceedings under any order or decree made by a district court under sections thirty-two and thirty-seven of this chapter as amended by this act; but the justice of said court or the appellate division of said court having jurisdiction of such review may stay all proceedings under such order or decree and make necessary or proper orders to protect the rights of persons interested therein; and any such order of a justice of said court for a stay of proceedings or for protection of any such rights may be varied or discharged by said appellate division upon motion.

Section 43. The jurisdiction hereby conferred upon the district courts of proceedings under sections thirty-two and thirty-six of chapter two hundred and nine may be exercised upon petition, and no entry fee shall be charged in connection therewith nor in connection with any subsidiary matter arising thereunder. The justices, or a majority of them, of all the district courts, except the municipal court of the City of Boston, shall make and promulgate uniform rules and forms for regulating the practice and course of proceedings with relation thereto, including rules requiring such notice of said proceedings and rules for legal review as may be necessary or proper. The municipal court of the City of Boston shall likewise make and promulgate such rules and forms as may be necessary or proper for the regulation of such proceedings in said court.

Section 10. Section twenty of chapter two hundred and eight of the General Laws is hereby amended by striking out the last sentence and inserting in place thereof the following: "Such orders and decrees may be changed or annulled as the court may determine, and shall, while they are in force, supersede any order or decree of the probate court under sections thirty-two and thirty-seven of chapter two hundred and nine, or any order or decree of a district court under sections thirty-two

and thirty-seven of chapter two hundred and nine as amended by this act."—so as to read as follows:

Section 20. The court may, without entering a decree of divorce, order the libel continued upon the docket from time to time, and during such continuance may make orders and decrees relative to a temporary separation of the parties, the separate maintenance of the wife and the custody and support of minor children. Such orders and decrees may be changed or annulled as the court may determine, and shall, while they are in force, supersede any order or decree of the probate court under sections thirty-two and thirty-seven of chapter two hundred and nine, or any order or decree of a district court under sections thirty-two and thirty-seven of chapter two hundred and nine as amended by this act.

Section 11. Section twenty-eight of chapter two hundred and eight of the General Laws as amended by chapter two hundred and sixty-one of the acts of nineteen hundred and thirty-one, is hereby further amended by adding at the end thereof the following: "Any such decree shall supersede any order or decree of the probate court under sections thirty-two and thirty-seven of chapter two hundred and nine, or any order of a district court under sections thirty-two and thirty-seven of chapter two hundred and nine, as amended by this act."—so as to read as follows:

Section 28. Upon decree of divorce, or petition of either parent, or of a next friend in behalf of the children, after notice to both parents, after such decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain, or may award their custody to some third person if it seems expedient or for the benefit of the children; and afterward may from time to time, upon the petition of either parent, or of a next friend, revise and alter such decree or make a new decree as the circumstances of the parents and the benefit of the children may require. Any such decree shall supersede any order or decree of the probate court under sections thirty-two and thirty-seven of chapter two hundred and nine, or any order of a district court under sections thirty-two and thirty-seven of chapter two hundred and nine, as amended by this act.

Section 12. Section thirty-five of chapter two hundred and eight of the General Laws, is hereby amended by striking out in lines two and three the words "as it may enforce decrees in equity" and by inserting in place thereof the words, "as decrees may be enforced in equity."—so as to read as follows:

Section 35. The court may enforce decrees for al owance, alimony or allowance in the nature of alimony, in the same manner as decrees may be enforced in equity.

Section 13. Section four of chapter two hundred and fifteen of the General Laws, is hereby amended by striking out said section and by inserting in place thereof the following section:

Section 4. Probate courts shall have exclusive original jurisdiction of petitions of married women relative to their separate estate provided for by section thirty of chapter two hundred and nine.

Section 14. Section forty of chapter two hundred and forty-eight of the General Laws is hereby amended by inserting after said section the following new section:

Section 40A. In proceedings under sections thirty-two and thirty-seven of chapter two hundred and nine as amended by this act, in which the custody of

a minor is concerned a district court shall have all the powers provided in sections thirty-five to forty inclusive of this chapter.

Section 15. Section one of chapter two hundred and seventy-three of the General Laws as appearing in the Tercentenary Edition is hereby amended by striking out the last sentence and by inserting in place thereof the following sentence "In a prosecution hereunder for desertion or non-support against a husband, a decree or judgment of a probate court in a proceeding in which the husband appeared or was personally served with process, establishing the right of the wife to live apart or her freedom to convey and deal with her property, or the right to the custody of the children, or a decree or judgment of a district court made in like manner under sections thirty-two or thirty-seven of chapter two hundred and nine as amended by this act, establishing the right of the wife to live apart or her freedom to convey and deal with her property, or the right to the custody of the children, shall be admissible and shall be prima facie evidence of such right."—so as to read as follows:

Section 1. Any husband or father who without just cause deserts his wife or minor child, whether by going into another town in the commonwealth or into another state, and leaves them or any or either of them without making reasonable provision for their support, and any husband or father who unreasonably neglects or refuses to provide for the support and maintenance of his wife or minor child, and any husband or father who abandons or leaves his wife or minor child in danger of becoming a burden upon the public, and any mother who deserts or wilfully neglects or refuses to provide for the support and maintenance of her child under the age of sixteen, and any parent whose minor child by reason of the neglect, cruelty, drunkenness, habits of crime or other vice of such parent is growing up without education, or without salutary control, or without proper physical care, or in circumstances exposing such child to lead an idle and dissolute life, shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than one year, or both. No civil proceeding in any court shall be held to be a bar to a prosecution hereunder for desertion or non-support. In a prosecution hereunder for desertion or non-support against a husband, a decree or judgment of a probate court in a proceeding in which the husband appeared or was personally served with process, establishing the right of the wife to live apart or her freedom to convey and deal with her property, or the right to the custody of the children, or a decree or judgment of a district court made in like manner under sections thirty-two or thirty-seven of chapter two hundred and nine as amended by this act, establishing the right, of the wife to live apart or her freedom to convey and deal with her property or the right to the custody of the children, shall be admissible and shall be prima facie evidence of such right.

Section 16. The probate court shall retain jurisdiction of all proceedings brought in said court under sections thirty-two and thirty-seven of chapter two hundred and nine prior to the time that this act shall take effect; and nothing contained in this act shall be construed to affect any rights acquired under any decrees of a probate court entered in any proceeding brought therein before this act takes effect.

Section 17. This act shall take effect on the first day of January nineteen hundred and thirty-seven.

Appellate Divisions

What was in the nature of an experiment has now become a fixed element in judicial procedure. The appellate divisions first established in 1912 in the Municipal Court of the City of Boston and extended in 1922 to all the District courts of the commonwealth have, as we have already indicated, become fixed elements in our procedure. There are three processes which were not originally included within the terms of the acts establishing these divisions—summary process, supplementary process and petitions to vacate judgments. We see no reason why matters of law arising in the trial of these matters should not be determined by the appellate divisions. Accordingly we recommend that the statutes be so amended as to accomplish this and submit three suggested drafts for the purpose as follows:

An Act Relative to Appeals in Summary Process Cases

General Laws, chapter 239, is hereby amended by striking out section 5 and inserting in lieu thereof the following:

"*Section 5.* The provisions of sections 103 to 110 inclusive of chapter 231 as most recently amended shall be applicable to all cases brought hereunder. No removal or report shall be allowed, except as provided in the following section, until the defendant shall have given bond in such sum as the Court orders, payable to the plaintiff, with sufficient surety or sureties approved by the plaintiff or Court, conditioned to pay to the plaintiff if final judgment is in his favor all rent accrued at the date of the bond, all intervening rent and all damage and loss which he may sustain by the withholding of possession of the land or tenement demanded and by any injury done thereto during such withholding, with all costs until the delivery or possession thereof to him. Upon final judgment for the plaintiff all money then due to him may be recovered in an action on the bond."

and by striking out Section 6 and inserting in lieu thereof the following:

"*Section 6.* If the action is for possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be the payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the date when the mortgage was foreclosed until possession of the land is obtained by the plaintiff."

Section 103 of chapter 231 is hereby amended by striking out the last sentence thereof.

An Act Relative to Appeals in Supplementary Proceedings

Section 30 of chapter 224 is amended by adding thereto the following:

"Any question of law arising in any proceeding after judgment may be reported as a case stated to the appellate division which shall have power to make any order therein which justice may require, and no petition for any extraordinary writ shall lie for such cause unless application for said report has been made and the same refused."

An Act Relative to Appeals in Petitions to Vacate Judgments

Section 103 of chapter 231 is hereby amended by adding thereto the following:

"This and the seven following sections shall apply to petitions to vacate judgments brought under the provisions of chapter 250."

CRIMINAL JURISDICTION OF DISTRICT COURTS

The criminal jurisdiction of the District Courts is now established by the provisions of section 26 of chapter 218. A study of the history of this section shows constant enlargement of this jurisdiction. There seems to be no sound reason why this jurisdiction should not be further enlarged. There is no pecuniary limit on the civil side. The present statute gives jurisdiction of "all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections 18 and 19 of chapter 266 and the crimes of forgery of a promissory note or of an order for money or other property and of uttering as true such a forged note or order knowing the same to be forged if the money or the value of the property does not exceed fifty dollars." In our opinion the criminal jurisdiction should be enlarged to cover all offences for which the statutes provide the *alternative* penalties of a state prison sentence *or* fine or imprisonment in a jail or house of correction thus enabling the District Court to dispose of the less serious cases which do not call for a state prison sentence and hold the more serious cases for the grand jury and trial in the Superior Court. Since 1911, they have been authorized to do this as to certain felonies, as shown by the language quoted above, and there seems to be no reason why they should not be authorized to do it in all as to which the legislature has recognized by statute that the facts may not call for a state prison sentence. An incidental result should be an increase in business in these courts thus helping to bring about full time service by the judges. Accordingly we recommend that said section 26 be amended and submit the following:

Draft Act Affecting the Criminal Jurisdiction of District Courts

Section 26 of chapter 218 is hereby amended by striking out the following words: "all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections eighteen and nineteen of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged, if in either case the sum of money or the value of the property named in such note or order does not exceed fifty dollars," and inserting in lieu thereof:

"All felonies for which a penalty of fine or imprisonment in a jail or house of correction is provided."

WITHDRAWAL OF APPEAL IN CRIMINAL CASES

A substantial number of appeals in criminal cases brought before the District Courts are withdrawn prior to action thereon in the Superior Court. The pertinent provisions with reference to such

withdrawals are found in chapter 278, section 25. Therein it is provided:

> "The appellant may at any time before the next sitting of the Superior Court for criminal business come personally before the court or trial justice from whose judgment the appeal was taken and withdraw his appeal."

The practical effect of this provision is that once the Superior Court begins its sitting, the right to withdraw the appeal ceases even if no action is taken by the Superior Court other than continuance. In many parts of the commonwealth there is a lapse of months between sittings of the Superior Court for the transaction of criminal business. Under such conditions it seems advisable to extend the right of withdrawal of appeal beyond the strict limitation imposed by the present provisions. We recommend that this right be granted at any time after the next sitting of the Superior Court provided no action except continuance has been taken by that court.

To carry into effect this recommendation we submit the following:

Draft Act Relative to Withdrawal of Appeals in Criminal Cases

Section 25 of chapter 278 of the General Laws is amended by adding after the word "business" in the second line the following words "and at any time thereafter if no action shall have been taken by the Superior Court except continuance", so that said section 25 as amended will read as follows:

> "The appellant may, at any time before the next sitting of the Superior Court for criminal business, *and at any time thereafter if no action shall have been taken by the Superior Court except continuance*, come personally before the court of trial justice from whose judgment the appeal was taken and withdraw his appeal. If the appellant has been committed, the officer in charge of the jail, within forty-eight hours after his continuance, shall notify him of his right to withdraw his appeal and shall furnish him with a blank form of withdrawal, which, if signed by him, shall be witnessed by said officer; thereupon, or if prior to said notice the appellant notifies the said officer of his desire to withdraw his appeal, the said officer shall forward the defendant, with the signed form of withdrawal, to the court or trial justice before whom the appeal was taken. In such case the court or trial justice may order the appellant to comply with the sentence appealed from, in the same manner as if it were then first imposed, or may revise or revoke the same if satisfied that cause for such revision or revocation exists; provided, that the court or trial justice shall not increase the sentence as first imposed, and if sureties had recognized with the appellant to prosecute his appeal they shall be discharged. If the copy of the record of conviction has been transmitted to the superior court, the court or trial justice shall notify the clerk of the superior court of the withdrawal of the appeal, who shall thereupon make a memorandum thereof upon the record of the superior court."

Arrest of Non-residents for Speeding with a Motor Vehicle

We are advised that by reason of the wording of section 21 of chapter 90, the enforcement of our motor vehicle laws is at times

unjust to non-residents. Briefly stated this section provides that if any officer authorized to make arrests may arrest without warrant and keep in custody for not more than twenty-four hours, unless Sunday intervenes, any person operating a motor vehicle on any way who does not have in his possession a license to operate motor vehicles granted to him by the registrar and who violates any statute by law," etc., "relating to the operation or control of motor vehicles." The last sentence of the section then provides that "any person operating a motor vehicle who is arrested as aforesaid and solely because he has violated the provisions of section 17 [the section dealing with speed limits] or a regulation under section 18 [the section dealing with special speed regulations] shall be admitted to bail for his appearance in court upon a deposit of one hundred dollars in cash with any person authorized to take bail in lieu of furnishing a surety or sureties."

As construed by many police officers and the clerks (and the strict language supports them) a non-resident (having a right to drive in Massachusetts but not having a Massachusetts license) who is arrested for speeding must furnish sureties or bail of one hundred dollars because he has not a license issued by the Massachusetts registrar whereas a resident holding such a license can be admitted to bail in any sum deemed reasonable by the bailing officer. A non-resident is thus placed at a disadvantage because in many cases he cannot obtain sureties or in lieu thereof furnish one hundred dollars cash bail. To correct this situation we recommend that this section be amended and submit the following draft:

Draft Act Amending the Motor Vehicle Laws

Section 21 of chapter 90 is hereby amended by striking out the last sentence of said section.

FINES AND FORFEITURES

For many years it has been the custom of the legislature in establishing penalties to use the words "fine" and "forfeit" or "forfeiture." A careful inspection of the statutes does not disclose any settled plan or convincing reason for such a practice. It has in the past and still does lend itself to confusion. It is not always easy for clerks and justices to bear in mind that one offense is to be punished by imposing a fine and the other by ordering the defendant to forfeit a certain sum. It has generally been assumed that the words are interchangeable and that the courts have authority to commit the defendant for non-payment of a forfeiture as they unquestionably have for the non-payment of a fine. This opinion is supported by the decision in Commonwealth *vs.* Novak 272 Mass. 113 wherein appears the following:

"A forfeiture is a penalty or fine imposed for the offence."

The court further says on page 115:

"The fact that the defendant was to stand committed until the order of the court was complied with is not an argument against the validity of the statute."

Nevertheless there are justices who are of the opinion there is no statute authorizing the commitment of a defendant for non-payment of a forfeiture but that the sole remedy is under the provisions of section 1 of chapter 280. This section reads as follows:

"Fines and forfeitures exacted as punishments for offenses or violation or neglect of any duty imposed by statute may, unless otherwise provided, be prosecuted for and recovered by indictment or complaint or by an action of tort in the name of the Commonwealth in a court having jurisdiction of the offence or action."

We are of the opinion it will make for clarity if a clause be appropriately inserted in General Laws, chapter 4, section 7, giving the two words identical meaning.

We submit the following draft for that purpose.

An Act Concerning Penalties

Section 7 of chapter 4 is hereby amended by inserting at the appropriate place the following:

"Forfeit—Ninth A. Forfeit wherever used as establishing a penalty shall be identical in meaning with the word 'Fine.' "

REPORT REQUESTED BY THE LEGISLATURE ON HOUSE 990 RELATIVE TO CONTINGENT FEES

Resolves Chapter 7 of the current year provided as follows:

"That the judicial council be requested to investigate the subject matter of current house document numbered nine hundred and ninety, relative to authorizing the making by attorneys at law of certain contingent fee agreements with their clients, and to include its conclusions and recommendations in relation thereto, with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year."

House 990, thus referred to, provides that:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section fifty-two, as appearing in the Tercentenary edition, the following new section:

Section 52A. It shall be lawful for an attorney at law to make an agreement with a client for whom he is seeking to recover or obtain any sum of money or any thing that his fee for his services shall be in whole or in part contingent upon success or that it shall be measured by the amount recovered or that he shall be paid out of the sum or proceeds of the thing recovered or obtained for his client, or any or all of the foregoing in combination. No such agreement shall be deemed to be void for champerty or maintenance.

This subject was dealt with in the fourth report of the Judicial Council in 1928 (pages 25 to 30) in connection with the abuses of

the practice of contingent fees in personal injury cases which were a matter of current public comment at the time. After referring to the disclosures resulting from the then recent investigations in New York, Philadelphia and elsewhere, the Judicial Council said: "human nature is very much the same in different places and in any large city the same opportunities are apt to lead some members of the bar to forget proper professional standards and take advantage of such opportunities."

The experiences of grievance committees since, as well as before 1928, have shown this to be true in Massachusetts as well as elsewhere. The report continued:

"In considering what should be done, it is important first to call attention to the fact that the law of Massachusetts differs somewhat from that of New York or Pennsylvania in regard to some of these practices. In the first place, the common law of champerty and maintenance has never been changed by statute in Massachusetts but is still in force, as pointed out by Chief Justice Rugg in *Holdsworth* v. *Healy*, 249 Mass. 436.

"Other leading cases are, *Hadlock* v. *Brooks*, 178 Mass. 428; *Blaisdell* v. *Ahern*, 144 Mass. 393 and *Ackert* v. *Barker*, 131 Mass. 436.

"But the law on this subject is..... we believe, commonly misunderstood by the bar."

Without discussing the cases in detail we understand the law to be that a lawyer is entitled to *reasonable* compensation for his services and that the test of reasonableness varies with the circumstances in different cases.* In the case of *Hadlock* v. *Brooks* (above cited) the court said:

"As was held in *Blaisdell* v. *Ahern*, there may be circumstances in which the attorney may lawfully agree to give his services without charge, if the suit should not be successful, and if in case of success, and not otherwise, the attorney's fees are to constitute a debt due from the client and give a right of action against him to recover them, so that the attorney's right is not confined to an interest in the thing recovered, it is immaterial that the avails of the suit or a part of them are pledged as security, or that such avails are the means and the security on which the attorney relies for payment."

It is a recognized fact that many plaintiffs in personal injury cases, if not the majority of them, would be unable to retain counsel unless they were permitted in some way to use their claim for compensation as an asset. That such a social need exists is proven by the fact of an almost universal breakdown of the straight fee system in such cases. A common form of contingent agreement between lawyer and client which is clearly legal is an agreement for *reasonable* compensation under all the circumstances *not to*

* *Caverly* v. *McOwen*, 123 Mass. 574; *Hyde* v. *Mazie Nerve Food Co.*, 160 Mass. 559; *Blair* v. *Columbia Fireproofing Co.*, 191 Mass. 333, at page 336; In the Matter of Hale, 197 Mass. 437–8.

exceed a sum equal to 33% per cent (or some other reasonable percentage) of the amount recovered in case of success. But an agreement for a fixed percentage of the amount recovered is illegal and void. As the Judicial Council further said in its fourth report:

"The distinction between a legal and an illegal agreement appears slight to laymen and to many lawyers. In any event it is probable that in many cases there is no very definite agreement between the lawyer and his client in the beginning or, if there is an agreement, it is in rather casual language. The principal abuse probably arises from the practice of exacting from the client, at the end of the case, a 50-50 division, or some percentage which largely exceeds the value of any services rendered, with possible additional payments to medical men and others, out of the client's share."

The law, as we have already stated it, sufficiently protects the lawyer and the opportunity of the client to obtain the services of a lawyer, and the question is not whether the lawyer should be relieved from his professional restraints but whether the interests of justice require more adequate rules for the protection of clients along the lines suggested in the fourth report, pages 29 to 30. It was there suggested—

"that there should be a rule or, if necessary, a statute, providing that in cases of personal injuries no attorney shall deduct, whether by previous agreement or not, more than an amount equal to 33⅓ per cent of the amount recovered by settlement or otherwise for compensation and expenses, except with the approval of the court under special circumstances shown, on motion of the attorney after notice to the client."

In our opinion there is no reason for departing from the recommendation in our former report, except, perhaps, to register an even stronger objection to legislation dealing with the subject. In addition to the reasons given in the fourth report, the conclusion is supported by the following considerations:

There is an important question of policy involved in attempting to regulate the practice of attorneys by statute. So long as the subject remains within the rule-making and disciplinary power of the courts, it may be dealt with in an elastic manner. Once a standard of conduct is crystallized in a statute, however, what is merely permitted may be construed as an invitation and excesses may be defended by the argument of authority granted by the legislature. Moreover, there is a doubt whether such a proposed statute would be binding upon the courts in any event. In the matter of Cohen, 261 Mass. 484, at page 488, Chief Justice Rugg said: "Whatever may be his constitutional rights, a member of the bar must conduct himself as an officer of the court in such manner as not to offend against reasonable rules of propriety established

by the court for the general welfare." In *Davis* v. *Commonwealth*, 164 Mass. 240, the court, in upholding a contract by which the governor and council retained a lawyer upon a contingent basis under legislative sanction, based its opinion on the narrow ground that the legislature could determine for itself the public policy required in prosecuting claims of the commonwealth against the United States. But this decision does not modify the authority of the court to regulate practice in private litigation.

We recommend, therefore, that House Bill 990 should not be adopted.

DISTRICT COURT PROBATION OFFICERS

In our Tenth Report we discussed the matter of the appointment of probation officers in the District Courts, other than the Municipal Court of the City of Boston. We there said

"In the Superior Court, probation officers are appointed by a committee of judges; in the Municipal Court of the City of Boston, appointment is by the chief justice subject to the approval of the associate justices; in all other district courts, the standing justice alone appoints. It seems wiser to have some confirmatory power in existence, covering both appointment and removal, and the only question is where that power should be lodged. By and large, we believe the district court judges endeavor to exercise this power of appointment wisely, but there have been some unfortunate choices and we feel that the needed qualifications are not always well understood or present. The growth of the importance and work of our district courts adds force to the suggestion that some added control has become necessary . . . we think that a needed improvement, as conditions now are, lies in the placing of this confirmatory power in the Administrative Committee of the District Courts, with whom the officials of these courts have learned to work. The three judges constituting this committee are designated by the Chief Justice of the Supreme Judicial Court. They are active presiding justices of appellate divisions in different parts of the Commonwealth and by reason of their knowledge of the district court system and its important departments, of which probation is by no means the least, will bring to this duty experience and practical knowledge of the situation gained not only from service in their own courts but from regional conferences with court officials throughout the Commonwealth, which form part of the regular service of the Administrative Committee. From information which has come to us, we believe this plan will meet with the approval of most of the judges and probation officers. It has seemed to us that a probation officer who has accepted the office, and possibly given up a remunerative position should be protected against removal or discharge by requiring the approval of the Administrative Committee to such action."

At the hearing on this recommendation by the legislative committee to which it was referred, statements were made which confirmed our view that legislation is needed. We are of the opinion now that our recommendation of last year may well be enlarged to the advantage of all by inserting a provision in the proposed legislation to the effect that the Administrative Committee shall

in all cases of appointment, removal, or discharge advise with the Board of Probation.

Accordingly we recommend the enactment of the following Act:

An Act Relative to Appointment of District Court Probation Officers

Chapter 276 of the General Laws is hereby amended by striking out Section 83 and substituting the following (*the new portions being printed in italics*):

"*Section 83.* The superior court, the chief justice of the municipal court of the city of Boston, subject to the approval of the associate justices thereof, and the justice of each other district court *with the written approval of the administrative committee of the district courts, who shall consult the board of probation relative thereto,* and the justice of the Boston Juvenile Court may appoint such male and female probation officers as they may respectively from time to time deem necessary for their respective courts and if there is more than one probation officer in one court one of such officers may be designated as chief probation officer. All officers so appointed shall hold office during the pleasure of the court making the appointment *provided however that no officer appointed by a justice of a district court other than the Municipal Court of the City of Boston or the justice of the Boston Juvenile Court shall be removed or discharged from office unless such removal or discharge shall be approved in writing by the administrative committee of the district courts after consultation with the board of probation relative thereto.* The compensation of each probation officer appointed by the superior court shall be fixed by that court and by it apportioned from time to time among the counties wherein said officer performs his duties. In the municipal court of the city of Boston the chief justice of said court, subject to the approval of the associate justices thereof, and in other district courts and in the Boston Juvenile Court, the justice thereof, shall fix the compensation of each probation officer appointed for such court, which compensation shall be subject to approval by the county commissioners and shall be paid by the county on vouchers approved respectively by the chief justice of the Municipal Court of the City of Boston or by the justice of such other district or juvenile courts."

PROCEDURE AS TO THE OFFENCE OF "DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR"

In our Tenth Report we discussed at some length the procedure as to the offence of driving under the influence of intoxicating liquor. We there said:

"The procedure required by statute with reference to the prosecution for the offence of driving a motor vehicle while under the influence of intoxicating liquor is in our judgment awkward, cumbersome and unnecessary" . . . "No complaint for this offence can be secured until the registrar has been communicated with and the record of the defendant obtained. If it appears that the defendant has been finally convicted of a like offence within a period of six years, the complaint must charge a second offence. The penalty for a first offence is a fine of not less than twenty nor more than two hundred dollars, or a sentence of not less than two weeks nor more than two years or both . . . for a second

offence not less than one month nor more than two years. Not only is this latter punishment mandatory but it cannot be suspended or the case filed no matter what the facts incident to the offence or to the defendant are shown to be." . . . "There was a marked difference of opinion as to the advisability of the changes from the original statute at the time those changes were adopted, but whatever good results may have followed those changes at the time of their adoption, we think that the results of the present law are unfortunate and that the time has come to repeal the present section and to substitute provisions to meet the existing conditions in the light of the experience of the past few years. Complaints should issue when the defendant first appears in court. There should be no necessity of charging a second offence. The penalty should be a fine or imprisonment or both. We do deem it proper that there should be a provision that no complaint shall be finally disposed of until the record of the defendant has been obtained from the Registrar of Motor Vehicles. The principle of mandatory sentence is in our opinion wrong, for the courts should be at liberty to exercise sound discretion within the area of the penalty provided, as otherwise they are obliged to punish the offence and not the offender. Moreover, a mandatory sentence, if of imprisonment, always makes for difficulty of conviction. Excluding aggravated cases, there is sympathy for a man if it is known conviction will be followed by a jail sentence. This attitude is reflected in a disinclination to arrest, to prosecute, to testify and to convict. The present statute invites failure to prosecute, appeal and acquittal. It does not distinguish the case of no accident from serious accident. It works a hardship upon poor men who cannot furnish surety on appeal or employ lawyers and gives an advantage to the man who can command sureties and money. It must also be borne in mind that the suspension of a license to operate for one year, five or ten years is a severe penalty in and of itself.

"Such a change as we recommend will in our opinion result in fewer appeals, and acquittals will be lessened when juries know that the court is not bound to sentence to a penal institution, if they return a verdict of guilty. We are not unmindful of the seriousness of the offence even if intoxicating liquor is not a causative factor in accidents comparable with other elements such as speed, inattention and ignorance, nor of the necessity of insistence upon sobriety on the part of the drivers of motor vehicles, and we believe that the courts are equally appreciative of such seriousness and necessity. We are not seeking to lessen the number of convictions but to increase them in cases which deserve conviction and to make more sure that such offenders shall be removed from our highways. While the changes thus proposed are being made, it seems wise to increase the minimum and maximum fines. We called attention to the necessity for so doing in our fifth report (page 29). Further the present section 24 is long and somewhat involved and confusing."

We therefore recommend the enactment of the following:

Draft Act

FOR THE MORE EFFECTIVE AND MORE JUST ENFORCEMENT OF THE LAW AGAINST DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

Chapter ninety of the General Laws is hereby amended by inserting after section twenty-three, as amended by chapter sixty-

nine of the acts of nineteen hundred and thirty-three, the following new section:

Section 23A. Whoever upon any way or in any place to which the public has access operates a motor vehicle while under the influence of intoxicating liquor shall be punished by a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years, or both. Before a court or magistrate imposes sentence upon a person found guilty of this offence, he shall communicate with the office of the registrar and shall inquire as to whether there is in said office any record or other information tending to show that said person has been convicted of a like offence by a court or magistrate of the commonwealth (within a period of six years immediately preceding the commission of the offence with which he is charged). A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who shall revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle, or has exclusive control of any motor vehicle as a manufacturer or dealer, the registrar may revoke the registration of any or all motor vehicles so owned or exclusively controlled. The registrar, after having revoked a license under this section, shall not issue a new license to the same person, except in his discretion to a person acquitted in the superior court upon appeal from a conviction by a district court or magistrate or after a new trial granted following a conviction in the superior court, until one year after the date of a final conviction for a first offense or five years after any subsequent conviction; but notwithstanding the foregoing no new license shall be issued by the registrar to any person convicted of a violation of this section until ten years after the date of conviction in case the registrar determines upon investigation and after hearing that the action of the person so convicted in committing such offence caused an accident resulting in the death of another, nor at any time after a subsequent conviction of a like offence in case the registrar determines in the manner aforesaid that the action of such person so subsequently convicted in committing such subsequent offence caused an accident resulting in the death of another.

The prosecution of any person hereunder, if a subsequent offence, shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment, and sentence according to the regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only by motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

Except for the purpose of immediate revocation of a license by the registrar upon notice of conviction, a person shall be held to have been convicted of driving a motor vehicle while under the influence of intoxicating liquor, for the purposes of this section, if he shall have pleaded nolo contendere or shall have been found or adjudged guilty by a court of competent jurisdiction, notwithstanding he shall have been placed on probation with or without sentence or the sentence shall have been suspended or the case placed on file; provided, that his conviction is still in

force and no appeal therefrom or bill of exceptions in connection therewith is pending.

Said chapter ninety is hereby further amended by striking out section twenty-four, as amended by section one of chapter twenty-six of the acts of nineteen hundred and thirty-two, and inserting in place thereof the following:

Section 24. Whoever upon any way or in any place to which the public has a right of access operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen, or whoever without stopping and making known his name, residence and the number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever uses a motor vehicle without authority knowing that such use is unauthorized, or whoever loans or knowingly permits his license to operate motor vehicles to be used by any person, or whoever makes false statements in an application for such a license or falsely impersonates the person named in such an application or procures such false impersonation whether by himself or by another, shall be punished by a fine of not less than (twenty nor more than two hundred dollars) or by imprisonment for not less than two weeks nor more than two years, or both.

Any person who operates a motor vehicle upon any way or in any place to which the public has a right of access and who without stopping and making known his name, residence and the number of his motor vehicle, goes away after knowingly colliding with or otherwise causing injury to any person shall be punished by imprisonment for not less than two months nor more than two years. A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and, shall unless the court or magistrate recommends otherwise revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled. The registrar in his discretion may issue a new license to any person acquitted in the superior court or after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar to any person convicted of going away without stopping and making known his name, residence and the number of his motor vehicle after having, while operating such vehicle upon any way or any place to which the public has a right of access, knowingly collided with or otherwise caused injury to any person until one year after the date of his original conviction if for a first offence or two years after any subsequent conviction, or to any person convicted of violating any other provision of this section until sixty days after the date of original conviction if for a first offence or one year after the date of any subsequent conviction. The prosecution of any person for the violation of any provision of this section, if a subsequent offence, shall not unless the interests of justice require such disposition be placed on file or otherwise disposed of except by trial, judgment and sentence according to the

regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only on motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

Avoidance of Double Trials in Misdemeanor Cases in the Boston Municipal Court and a Judicial Appellate Division for Review of Sentences

The Judicature Commission, in its 1921 Report, and the Judicial Council in its First, Seventh, Eighth, Ninth and Tenth Reports had recommended a plan to abolish double trials in misdemeanor cases by requiring the defendant to elect whether he wished to be tried in the Superior Court or in the District Court. If he claimed a trial in the Superior Court the case would be immediately transferred; if he did not claim such trial, the case would be tried in the District Court and an appellate body of judges of that court would be created for the summary review of sentences. The practice of avoiding double trials of civil cases was first tried out in the Boston Municipal Court in 1912 and in 1922 was applied to all District Courts.

We renew our recommendation that this plan be, at least, tried out in the Municipal Court of the City of Boston, where there are nine full time Justices and where the proposed reviewing board could act promptly. The experience in the Boston Court would be helpful in considering how far it should be used in other parts of the state.

The present method of appeal lends itself to jockeying for better terms with the District Attorneys offices and imposes upon the commonwealth an unnecessary expense in duplication of trials where actual trials on appeal are had. Experience, however, shows that in too many cases on appeal the case is never re-tried but that better terms are made with the district attorney than were imposed by the court below. This sort of procedure does not enhance the dignity and prestige of the courts.

The Committee on Procedure of the Boston Chamber of Commerce have approved the suggestion.

We do not believe that this will increase the congestion in the Superior Court. The experience with civil cases and the short experience with motor accident cases convinces us that an increasing number of litigants prefer the speedy determination of matters in the district courts. Accordingly we recommend House Doc. No. 1547 of 1934 provided the bill is revised so that it applies only to the Boston Municipal Court. An earlier draft for this purpose will be found printed in Appendix B on page 67 of the Seventh Report

of the Judicial Council. These drafts should be amended to recognize the power of the court in proper cases to allow a defendant an opportunity to consult counsel before electing which court to be tried in.

SMALL CLAIMS PROCEDURE

We renew the recommendation contained in our Tenth Report about small claims procedure.

The First Report of the Judicature Commission* was entirely devoted to providing for the informal hearing and prompt disposition of small claims in the District Courts. The subject had been brought to the commission's attention with peculiar force by a recent publication, entitled "Justice and the Poor." The result was the enactment by the Legislature of a procedure whereby persons having small claims could present them somewhat informally and without the employment of counsel to the District Courts. The importance and significance of this procedure is shown by the fact that considerably over twenty thousand "small claims" are presented to the District Courts each year. If the defendant does not pay the finding for the plaintiff in these cases, the plaintiff is left to the use of the regular supplementary procedure, which is expensive and may require the services of an attorney. It was the purpose of the Judicature Commission to allow the judges to stay the entry of judgment or the issue of execution and to decide how and when the judgment shall be paid in the simplest manner and without formal proceedings. Some of the provisions, therefore, of the regular supplementary procedure ought to become a part of the small claims procedure. The Justices of the District Courts adopted Rule 10 of the Small Claims Procedure, which provides:

> "The court may order that the judgment shall be paid to the prevailing party, or, if it so order, into court for the use of the prevailing party, at a certain date or by specified instalments, and may stay the issue of execution and other supplementary process during compliance with such order. Such stay shall at all times be subject to being modified or vacated."

In order to enlarge this rule to meet the criticism, there must be sufficient statutory authority. It is doubtful whether the authority conferred on the court in the present Rule 10 to order payment in whole on a given date or payment by instalments has any validity except as the court may refuse stay if such order is not accepted by the losing party or may later vacate the stay if the order is not complied with; the court having no power to enforce the order by contempt proceedings because in the final analysis the order has no statutory basis.

* House Document 597 of 1920 reprinted in Massachusetts Law Quarterly for February 1920.

For the purpose of carrying out the general policy of the law in regard to these small matters and avoiding unnecessary delay and expense to small claimants as well as unnecessary "red tape" we recommend the following:

Draft Act

TO MAKE MORE EFFECTIVE THE PROCEDURE FOR THE COLLECTION OF SMALL CLAIMS

Section 1. Section twenty-two of chapter two hundred and eighteen of the General Laws is hereby amended by adding after the word "execution" in line eleven thereof the words "and authority to the Court, in its discretion, after proper inquiry, to order payment to the prevailing party of the amount found due on or before a day stated or by instalments, and to modify, extend or vacate such order and, in its discretion, to enforce such order by contempt proceedings, substantially in the manner provided in Chapter 224 to be more specifically stated in appropriate rule of the Court."

If the statute is amended in accordance with our recommendation, the Justices of the District Courts will be enabled to make an addition to their present Rule 10 which will read substantially as follows:

TENTATIVE DRAFT RULE FOR CONSIDERATION OF THE JUSTICES

The order for payment, in the discretion of the court, may be modified or extended and shall be vacated if at any time the stay is vacated. So long as the order for payment is in force, failure to comply with its terms shall be subject to action for contempt, on written request of the party in whose favor the order is made that the party subject to the order be so cited. The citation may be made by registered mail from the clerk's office. If party so cited fails to appear in response to such citation so served, capias may issue. If, after due hearing contempt is found and is not purged by the respondent to the satisfaction of the court, penalties may be imposed, not exceeding those provided for in supplementary proceedings in Section 18 of Chapter 224 of the General Laws (Ter. Ed.). Ordinary fees and expenses for service of papers shall be taxed as costs against the person on whom the service is made.

It shall be the duty of the court at the end of every hearing to inquire whether the prevailing party desires such order for payment and whether the circumstances of the other party are such as to warrant its being made.

MINOR SETTLEMENTS

In several previous reports we have called attention to the matter of the settlement of claims in favor of minors, who have no legal guardian, and whose interests are looked after by a "next friend." No interest of a minor in real estate can be disposed of, except by a guardian appointed by and responsible to the Probate Court; no executor or administrator will pay a legacy or distributive share of an intestate estate, to which a minor is entitled, except to a guardian appointed by the Probate Court or by deposit in the name of the

judge of probate for the benefit of the minor. But a claim for personal injuries sustained by a minor can be settled by a self-constituted "next friend" who is accountable to no court. We have called attention to the fact that in this regard Massachusetts lags behind most of the jurisdictions of the United States and our attention has recently been called to the fact that in England damages accruing to a minor for such personal injuries are paid into Court and are administered by the court for the benefit of the minor.*

Our practice is for the self-constituted "next friend" to bring a suit in behalf of a minor, which may be tried in the Courts or settled out of Court by an agreement between counsel representing the defendant and the "next friend." The proceeds of the claim are turned over to the so-called "next friend." Where cases are settled out of court by agreement of counsel occasionally the parties ask the court to enter judgment in the amount agreed and occasionally judges satisfy themselves by inquiry that the settlement is reasonable and in a few cases judges go further and pass upon attorneys fees and expenses. Most judges, however, regard their approval of settlement by agreement as too perfunctory to amount to anything and discourage the practice and most defendants have become willing to pay upon a judgment entered by agreement without the approval of any court. The result is that in cases tried and in cases disposed of by agreement the award to the minor is handled by a "next friend" accountable to no court, who often uses the minor's award for family expenses without court authority or supervision or entirely misappropriates it, with the result that nothing is conserved for the minor. We would not interfere with the prompt settlement of these claims; but when the injuries are serious and the amount considerable we believe that it should be paid to some responsible person. We therefore renew our recommendation and again submit a draft of an Act applicable only to cases in which the minors award by trial or settlement exceeds $50.

Draft Act to Protect Minors

If a minor is injured under circumstances which give rise to a claim for personal injuries, no settlement of said claim for a sum in excess of $500, or payment of a judgment or execution therefor in excess of said sum shall release the defendant or satisfy said judgment or execution unless and until paid to a legal guardian of said minor.

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* See Massachusetts Law Quarterly for August, 1935 page 12.

SUMMARY OF THE WORK ACCOMPLISHED BY THE VARIOUS COURTS

The act creating the Judicial Council (reprinted at the beginning of this report) provides that the Council shall study "the work accomplished and the results produced by the judicial system and its various parts" and "shall report annually upon the work of the various branches."

The annual periods reported by the different courts are not the same, some reporting for the last calendar year while others from June 30 to June 30, or from September 1 to September 1, etc. The details as to counties appear below and in Appendix B.

SUPREME JUDICIAL COURT

During the year ending August 31, 1935, the Full Bench decided 488 cases, including 3 cases in which there were rescripts but no opinions. There were also 5 advisory opinions of the justices rendered at the request of the legislature, making a total of 493.

The table of full bench cases since 1875 appears in Appendix A. There is also the usual table of Supreme Court business, other than full bench cases, with more detailed statements from several counties.

In order to learn something of the extent of the business of the Supreme Judicial Court in connection with prerogative writs, the clerk of that court for Suffolk County, at our request, prepared a summary covering the two-year period from September 1, 1932, to August 31, 1934. This summary is confined to Suffolk County where most of this business appears. For convenient reference in studying the business of this court, we print below the following:

Analysis of Petitions for Prerogative Writs in the Supreme Judicial Court for Suffolk County during the Two-Year Period from September 1, 1932, to August 31, 1934

During the two years in Suffolk County there were filed 124 petitions as follows:

Petitions for habeas corpus	26
Petitions for writs of error	15
Petitions for certiorari	19
Petitions for mandamus	53
Petitions for prohibition	10
Quo warranto	1
	124

In several instances more than one petition was brought involving the same issue. Probably therefore not more than 115 or 120 different cases were presented.

Of these petitions:

8 were dismissed by agreement and without hearing,
1 was reserved for the Full Court,
1 was transferred to the Equity docket.
10

At the close of the period there were 26 cases undisposed of as follows:

Habeas corpus	5
Writ of error	5
Certiorari	3
Mandamus	10
Prohibition	2
Quo warranto	1
	26

Of the 26 habeas corpus petitions:

10 concerned persons restrained in institutions,
8 concerned the custody of minors,
8 concerned persons under arrest for non-payment of taxes, etc.
26

Of the 15 petitions for writs of error:

5 were to reverse a judgment of the Superior Court,
1 was to reverse a judgment of the Municipal Court,
1 to test the legality of conviction for violating the liquor law,
8 involved the title to 24 barrels of rum.
15

Of the 19 certiorari cases:

8 had to do with actions of Licensing Boards, Zoning Regulations, Board of Tax Appeals, etc.,
4 were to review actions of District Courts in supplementary proceedings,
2 involved the reinstatement of officials,
2 involved the exercise of eminent domain,
1 to review action of Commissioner of Corporations on similarity of name,
1 involved the right of petitioner to have name on ballot,
1 to review action of Superior Court.
19

Of the 53 petitions for mandamus:

28 were to compel sundry officials to do or not to do something,
8 were stockholders applications to examine books,
7 had to do with election matters,
6 had to do with judicial proceedings,
2 were for reinstatement in organizations,
1 was to restrain entering into lease or contract,
1 was to determine who was Chairman of the Finance Commission of Boston.
53

Of the 10 writs of prohibition:

3 were to stop supplementary proceedings,
1 to stop issuing warrant for arrest,
1 to stop Referees from further proceeding,
1 to stop contempt proceedings,
1 to stop action on bail bond,
1 to stop the Mayor of Chelsea from suspending petitioner,
1 to stop certain proceedings in Revere,
1 to stop hearing in contract action.
10

The quo warranto proceeding was to restrain the Attorney General from appearing as counsel for a judge of the Municipal Court of the City of Boston in an action at law. No hearing was ever held on this matter and the petitioner was committed to the Foxboro Insane Hospital.

Supreme Judicial Court Entries for All Counties

FOR THE YEAR BEGINNING SEPTEMBER 1, 1934, THROUGH AUGUST 31, 1935
(*Not including full bench cases*)

COUNTY	Equity	Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to Bar	Other Proceedings
Barnstable	–	–	–	1	–	–
Berkshire	–	–	–	3	–	–
Bristol	1‡	–	1	–	1	3*
Dukes	–	–	–	–	–	–
Essex	5	1§	–	6	–	2
Franklin	–	–	–	2	–	–
Hampden	1	–	3	7	23	2
Hampshire	–	–	–	–	2	2†
Middlesex (For details see below)	9	–	9	21	–	10
Nantucket	–	–	–	–	–	–
Norfolk	1	–	–	4	–	1
Plymouth	3	–	–	3	1	–
Suffolk (For details see below)	49	4	11	63	1,081	–
Worcester (For details see below)	3	–	1	1	–	–
Totals	72	5	25	111	1108	20

* One, petition for Writ of Certiorari; two petitions for Writ of Mandamus.
† One appointment of bar examiner; one qualification of Clerk of Courts.
‡ Referred to Master.
§ Transferred to Probate Court.

Details for Suffolk County

SEPTEMBER 1, 1934 TO SEPTEMBER 1, 1935

Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to Bar
4	11	63	1081

Law Docket

Petitions for Admission to the Bar	1,081
Petitions for writs of Mandamus	33
Petitions for writs of Habeas Corpus	12
Petitions for writs of Certiorari	8
Petitions for writs of Error	5
Petitions for writs of Prohibition	4
Petitions for Disbarment	5
Petitions for Reinstatement	3
Petitions for Appointment of Commissioner to take evidence under G. L., Chap. 486, Acts of 1909 and Chap. 562, Acts of 1908	7
Petition to compel giving of testimony under G. L., Chap. 486, Acts of 1909 and Chap. 562, Acts of 1908	1
Petition for release on bail	1
In re "Fraudulent Practices" (Reports of Commissioners filed)	3
Appeals under G. L., Chap. 58a, sec. 13	3
Total Entries on Law Docket	1,166

Equity Docket

Suits in Equity	49
Informations by the Attorney General (for failure to file corporation returns, etc.)	1,179
Petitions for suspension of decree of Superior Court under G. L. (Ter. Ed. Chap. 152, Sec. 17	4
Petitions for Review under G. L., Chap. 175, sec. 132	2
Petition for Review under G. L., Chap. 25, sec. 5	1
Petition for Appointment of Commissioners under G. L., Chap. 130, ss. 77–78 as amended by St. 1933, Chap. 329–332	1
Information in the nature of Quo Warranto	1
Total Entries on Equity Docket	1,237
Total Entries on both Dockets	2,403

Details for Middlesex County

SEPTEMBER 1, 1934, THROUGH AUGUST 31, 1935

	Equity	Prerogative Writs	Petitions for Admission to Bar	Other Proceedings
Number pending at beginning of year	59	32	–	2
Number entered during year	9	21	–	10
Number disposed of during year	17	11	–	11
Number entered during year and transferred to Superior Court	–	–	–	–
Number entered prior to Sept. 1, 1934, and transferred to Superior Court during year	–	–	–	–
Number entered during year and referred to Masters	–	–	–	–
Number entered prior to Sept. 1, 1934, and referred to Masters during year	9	–	–	–

Superior Court Civil Cases, 1924-1935

Year Ending	Cases Entered			Total Entered			Number Tried During the Year							
	Suffolk County			In State			In Suffolk County				In State			
	Law	Equity	Divorce	Law	Equity	Divorce	Jury	Jury Waived	Equity	Divorce	Jury	Jury Waived	Equity	Divorce
June 30, 1924	9,923	1,809	565	21,964	3,230	1,412	1,569	274	292	589	2,594	563	475	1,571
June 30, 1925	10,034	1,615	306	23,900	3,090	906	1,695	209	391	274	3,022	514	562	707
June 30, 1926	–	–	–	23,223	3,316	–	1,074	337	445	–	2,735	668	683	–
June 30, 1927	11,863	2,135	104	24,516	3,655	554	1,149	380	342	89	2,857	696	601	452
June 30, 1928	16,270	1,920	40	32,551	3,392	469	1,053	350	404	43	2,672	669	679	402
June 30, 1929	16,562	2,011	27	33,165	3,502	365	1,089	243	378	26	2,517	490	536	285
June 30, 1930	17,584	2,133	11	35,190	3,642	196	1,069	325	441	16	2,684	617	632	271
June 30, 1931	18,370	2,120	17	36,190	3,604	111	1,063	362	312	7	2,533	808	510	122
June 30, 1932	16,209	1,846	6	34,464	3,411	81	966	335	398	10	2,505	725	605	92
June 30, 1933	12,210	1,883	2	28,587	3,536	67	787	695	400	2	2,080	1,319	606	63
June 30, 1934	10,412	1,630	1	25,446	3,251	90	849	469	415	2	2,131	1,022	586	65
June 30, 1935	8,991	1,546	–	22,075	2,881	66	741	425	388	–	2,360	817	655	62

Superior Court Criminal Cases, 1928-1935

For Year Ending	Number of Indictments Returned	Number of Appealed Cases Entered	Number of Cases Tried	Number of Actions on Bail Bonds or Recognizances Entered
June 30, 1928	4,005	10,455	2,192	287
June 30, 1929	4,054	11,926	2,553	218
June 30, 1930	4,532	9,559	2,521	191
June 30, 1931	5,525	9,901	3,308	121
June 30, 1932	6,519	10,421	3,371	206
June 30, 1933	6,090	9,324	3,427	77
June 30, 1934	5,203	10,742	3,537	128
June 30, 1935	5,217	9,924	3,279	205

Land Court

For the Year 1934:	
Registration Cases	210
Confirmation Cases	4
Post Registration Cases	445
Tax Lien Cases	856
Miscellaneous Cases	78
Equity Cases	26
Total Cases Entered	1,619
Decree Plans Made	229
Subdivision Plans Made	267
Total Plans Made	496
Total Appropriation	$90,256.67
Fees sent State Treasurer	$27,726.55
Income from Assurance Fund Applicable to Expenses (G. L. Chap. 185, Sec. 106)	$8,691.11
Unexpended Balance	$9,432.14
Net Cost to Commonwealth	$44,406.87
Assurance Fund, November 30, 1934	$241,840.83
Assessed Value of Land on Petition for Registration and Confirmation, 1934	$2,322,660.00

CASES DISPOSED OF BY FINAL ORDER, DECREE OR JUDGMENT AFTER HEARING:

Land Registration	196
Land Registration (Supplementary)	445
Tax Title	1,461
Equity, Real Actions and Miscellaneous	104
	2,206

PROBATE COURTS

Entries in 1934.

Counties	Probate Entries	Divorce Entries
Barnstable	415	60
Berkshire	782	160 7 annulments
Bristol	1,625	391
Dukes	65	12
Essex	3,027	588
Franklin	350	39
Hampden	1,407	409
Hampshire	597	58
Middlesex	5,530	1,097
Nantucket	58	4
Norfolk	2,121	378
Plymouth	1,159	122
Suxolk	5,265	1,345
Worcester	2,805	486
Totals	25,206	5,156

Further details from the counties of Berkshire, Hampden and Middlesex and Suffolk will be found below.

Details for Berkshire County, 1934

Probate Entries	
Wills	299
Administrations	276
Guardianships	88
Conservatorships	23
Adoption and change of name	28
Separate support	29
Absentee	4
Custody of child	3
Desertion and living apart	5
License to minor to marry	5
Marriage without delay	10
Partition and sale of real estate	4
Discharge from Parole	2
Trusteeship	1
Dissolution of Trust	1
Leave to dep. legacies	4
Total	782

Divorce Entries	
Divorce libels	160
Annulments	7
Total	167

Details for Hampden County, 1934

Probate Entries		Divorce Entries	
New cases	1,407	New cases	409
Papers filed	11,028	Papers filed	1,560
Accounts filed	2,201	Decrees nisi	310
Decrees	3,504	Decrees all others	98
Certificates	3,699	Certificates	290
Pages—attested copy	5,213	Orders of notice	496
Citations	1,925	Petition—Modification	9
Letters	1,181	Petition—Contempt	3
Licenses	76		
Fees collected			$11,588.30

Trial Record	
Cases assigned	915
Cases tried and disposed of	992
Designations of special and out-of-county judges	50
Days during which Court sat for trial	181

Details for Middlesex County, 1934

Probate Entries		Divorce Entries	
New cases	5,530	New cases	1,097
Papers filed	40,976	Papers filed	3,511
Accounts filed	4,402	Decrees nisi	821
Decrees	13,761	Decrees, all others	723
Certificates	15,572	Certificates	1,008
Pages—attested copy	22,998	Orders of notice	1,148
Citations	5,310	Petition—Modification	83
Letters	5,578	Petition—Contempt	134
Licenses	335		
Fees collected			$39,839.30

Trial Record	
Cases assigned	2,298
Cases tried and disposed of	1,544
Designations of special and out-of-county judges	131
Days during which Court sat for trials	278
Decrees entered between fourth Tuesday, July, and second Monday, September	1,025

Details for Suffolk County, 1934

New Cases Entered	Probate	5,265	
	Divorce	1,345	
	Commitments of insane	1,198	
	Commitments of feeble minded	28	
	Total	7,836	
Number of decrees entered and recorded			6,219
Many decrees entered by Court are not recorded and are not included in above figure.			
Total number of papers recorded			26,301
Original libels for divorce tried and disposed of		1,059	
Subsidiary proceedings in divorce tried and disposed of		632	
Probate cases tried and disposed of		1,157	
Total		2,848	
Temporary custody and temporary alimony decrees are not included in above figures.			
Included in the 1,059 libels for divorce tried and disposed of are 90 libels which were fully heard and denied and dismissed.			
Number of people in attendance at opening of Court in 1934			45,482
Number of people in attendance at opening of Court January 1st to November 15, 1935			44,516
No cases heard by Court in 1934 undisposed of except one pending in Supreme Judicial Court on appeal.			
Entry Fees	Probate	$19,214.00	
	Divorce	6,705.00	
Fees—Certificates and copies		12,103.90	
	Total	$38,022.90	

DISTRICT COURTS

The statistical table, prepared by the Administrative Committee of the District Courts, showing the business for the year ending October 1, 1935, is inserted opposite this page. This table does not include the Boston Municipal Court.

District Court Business, 1930-1935

A Five-year Comparison of Years from October 1 to September 30, Inclusive

(This table does not include the business of the Boston Municipal Court)

	1930 to 1931	1931 to 1932	1932 to 1933	1933 to 1934	1934 to 1935
Civil writs entered	67,846	75,619	75,329	70,797	80,056
Contract	–	–	39,826	34,859	32,036
Tort	–	–	17,830	21,286	32,403
Summary Process (Ejectment)	–	–	16,130	13,514	14,651
All other cases	–	–	1,543	1,138	965
Removals to Superior Court	3,168	3,567	3,393	3,626	8,887
Rep. to Appellate Division	214	284	330	317	339
App. to S. J. Court	25	20	50	38	42
Supplementary Process	14,244	14,202	10,547	10,034	9,038
Small Claims	25,571	23,304	22,835	22,656	22,881
Criminal Cases begun	1/2,027	163,031	149,146	162,402	159,273
Criminal Appeals	7,736	7,927	7,355	7,615	7,026
Drunkenness	58,246	52,588	54,361	74,849	71,542
Operating under influence of intoxicating liquor	5,079	4,506	3,994	5,446	5,451
Total automobile cases	48,000	46,657	42,662	44,160	46,475
Intoxicating liquor cases	5,690	5,189	3,475	1,832	844
Juvenile cases under 17 years	8,816	8,544	7,714	7,281	6,887

	1934–1935
Total motor tort cases	27,800
Total removals by plaintiffs	3,432
Total removals by defendants	4,277
Total removals by both	52
	7,761

STATISTICS OF THE DISTRICT COURTS OF MASSACHUSETTS FROM OCTOBER 1, 1934 TO OCTOBER 1, 1935 AS REPORTED BY THE CLERKS OF SAID COURTS.

Compiled by the Administrative Committee of District Courts

DISTRICT COURTS	Civil Writs Entered	Contract	Tort	Summary Process (Ejectment)	All Other Cases	Removals to S. C. (Total of all removals)	Total Motor Tort Cases entered	Total removals of such to Superior Court	Reported to App. Div.	Appealed to S. J. C.	Supplementary Process	Small Claims	Criminal Cases Begun	Criminal Appeals	Drunkenness	Automobile Cases (total)	Operating under influence of intoxicating liquor	Intoxicating Liquor Cases	Juvenile Cases under 17 years
Worcester, Central	6,309	2,337	2,744	1,196	32	720	2,197	684	12	1	417	1,071	8,937	198	4,431	2,782	266	35	467
Springfield	4,745	1,929	2,058	712	46	909	1,705	783	19	4	310	859	7,454	101	3,614	2,035	278	47	316
Middlesex, 1st Eastern	6,314	2,319	3,038	905	52	524	2,027	423	25	2	675	2,190	6,497	291	3,403	1,643	250	13	269
Roxbury	2,629	144	961	1,511	13	140	748	89	4	0	518	803	10,100	729	5,070	2,923	112	34	333
Bristol, Third	1,670	704	657	236	73	173	588	167	6	1	82	442	4,066	169	1,121	507	77	52	255
Middlesex, 3rd Eastern	5,501	2,321	2,172	971	37	471	1,950	414	17	4	581	936	8,038	309	3,545	2,300	174	35	416
Dorchester	2,135	263	885	982	5	135	627	123	9	0	852	953	5,453	404	2,979	1,207	125	23	262
Lowell	2,075	920	828	308	19	187	762	173	7	1	137	860	3,410	93	1,225	320	103	72	199
Bristol, Second	2,210	648	786	669	107	326	649	300	13	2	68	356	3,945	155	1,647	930	94	29	252
Essex, Southern	4,031	1,619	1,569	773	70	361	1,421	290	14	0	225	653	3,184	130	1,688	621	145	9	169
Lawrence	1,947	925	822	188	12	262	739	239	5	0	135	300	3,281	178	2,160	385	66	45	108
Norfolk, East	3,377	1,592	1,365	403	17	336	1,312	299	13	3	409	1,524	4,108	169	1,782	1,069	347	2	166
Somerville	2,365	1,022	788	540	15	170	700	73	5	0	252	413	2,431	338	1,509	267	104	3	146
West Roxbury	1,130	133	556	433	8	106	476	87	6	4	340	613	3,073	223	1,427	857	62	2	92
Essex, First	2,206	1,415	551	202	38	233	469	171	18	2	159	353	3,722	313	1,503	1,502	257	21	122
Brockton	1,587	601	703	196	87	157	665	153	11	1	112	250	3,144	34	1,631	710	93	9	234
East Boston	728	123	326	268	11	57	292	45	2	1	177	272	3,951	208	1,844	1,064	31	22	524
Chelsea	2,596	538	1,560	487	11	356	1,284	327	9	1	326	475	3,289	332	1,624	813	74	24	159
South Boston	416	48	167	198	3	45	103	35	0	0	94	92	9,323	194	6,555	1,232	45	35	326
Essex, North Central	1,169	509	461	190	9	112	411	105	4	0	58	503	1,517	197	853	229	64	2	22
Holyoke	674	277	309	86	2	136	260	117	4	0	38	232	884	20	486	143	27	86	77
Hampshire	650	294	293	56	7	130	278	126	3	0	48	419	1,575	116	637	428	99	21	72
Middlesex, 2nd Eastern	2,160	1,051	735	363	11	157	721	153	12	0	295	569	1,945	63	1,064	277	84	5	121
Berkshire, Central	841	441	251	142	7	87	212	69	4	1	71	236	2,603	20	747	1,189	85	7	99
Bristol, First	635	304	241	72	18	97	228	91	5	0	33	174	1,594	96	448	1,221	96	14	63
Middlesex, 4th Eastern	1,315	660	497	154	4	138	491	125	9	0	196	414	2,854	81	881	916	107	7	83
Newton	1,738	1,024	541	165	8	113	494	84	31	1	376	443	1,757	94	768	557	59	4	58
Fitchburg	660	347	211	98	4	92	205	90	3	1	45	95	1,796	53	1,300	296	56	3	70

Berkshire, Central	841	441	251	142	7	87	212	69	4	1	71	236	2,603	20	747	1,189	85	7	99
Bristol, First	635	304	241	72	18	97	228	91	5	0	33	174	1,594	96	448	1,221	96	14	63
Middlesex, 4th Eastern	1,315	660	497	154	4	138	491	125	9	0	196	414	2,854	81	881	916	107	7	83
Newton	1,738	1,024	541	165	8	113	494	84	31	1	376	443	1,757	94	768	557	59	4	58
Fitchburg	660	347	211	98	4	92	205	90	3	1	45	95	1,796	53	1,300	296	56	3	70
Norfolk, Northern	1,284	627	537	104	16	128	514	118	9	2	173	443	1,810	97	647	714	83	4	42
Brighton	1,246	148	461	635	2	89	369	71	3	1	311	384	2,592	98	1,290	762	61	5	78
Franklin, Greenfield	339	193	122	24	0	87	118	82	0	0	26	231	927	44	275	277	74	8	34
Worcester, 1st Southern	382	157	145	79	1	53	129	42	4	0	28	75	2,303	77	528	1,208	66	1	24
Brookline	2,089	1,175	720	185	9	210	660	170	6	3	425	397	1,669	55	414	942	58	0	59
Bristol, Fourth	320	172	109	32	7	48	109	46	3	0	18	121	1,624	81	242	695	82	6	59
Plymouth, Second	658	326	240	66	26	68	237	66	1	0	90	255	2,025	40	879	601	191	2	31
Chicopee	400	144	173	77	6	62	154	61	6	0	38	71	819	7	396	141	41	22	43
Worcester, 1st Northern	392	192	146	53	1	65	146	65	0	0	32	215	1,714	57	660	627	69	9	59
Charlestown	243	14	143	83	3	50	114	45	1	0	24	141	5,199	343	2,675	1,899	37	3	185
Middlesex, 1st Southern	859	412	356	71	20	163	274	148	5	0	96	282	819	19	267	195	37	1	48
Essex, Eastern	640	339	215	64	22	106	176	82	0	0	22	165	989	38	693	99	39	1	24
Norfolk, Western	528	271	215	36	6	80	203	69	1	1	62	181	1,320	62	291	781	114	1	35
Middlesex, Central	523	334	157	27	5	43	143	35	2	0	124	235	1,124	85	389	396	92	9	46
Worcester, 2nd Southern	310	71	213	25	1	40	213	40	0	0	4	39	536	13	112	155	27	5	1
Hampden, Western	198	105	53	31	9	22	47	20	0	0	20	94	1,394	16	430	379	76	9	53
Berkshire, Northern	176	68	63	43	2	26	56	25	2	0	8	50	861	11	466	403	16	5	56
Marlborough	457	184	251	19	3	82	224	65	3	0	47	128	416	10	215	74	35	0	9
Worcester, 2nd Eastern	325	113	146	41	25	71	132	67	3	3	23	43	441	26	70	248	26	1	32
Newburyport	294	164	105	24	1	22	86	10	1	0	42	189	1,185	38	262	723	35	6	16
Plymouth, Third	269	144	96	27	2	30	86	25	2	0	30	86	875	25	208	370	50	5	40
Peabody	555	261	223	55	16	63	220	63	0	0	30	150	1,083	47	610	237	42	12	60
Leominster	384	171	131	81	1	40	127	40	0	0	24	45	553	9	271	78	20	0	26
Worcester, Western	104	54	29	19	2	10	29	10	0	0	9	57	484	25	117	171	22	1	9
Worcester, 3rd Southern	312	128	148	34	2	42	147	42	2	0	27	68	393	8	89	114	9	3	21
Hampden, Eastern	90	48	38	4	0	24	24	24	0	0	8	38	950	20	148	604	40	3	17
Plymouth, Fourth	242	140	90	9	3	33	90	29	0	0	18	130	1,598	39	340	737	74	18	33
Norfolk, Southern	385	167	176	40	2	79	172	76	1	1	36	54	1,218	7	227	793	32	5	28
Middlesex, 1st Northern	154	86	62	6	0	33	62	27	1	0	19	44	881	21	217	489	48	2	22
Worcester, 1st Eastern	191	46	142	2	1	39	142	39	0	0	23	53	792	2	92	601	28	0	9
Berkshire, Fourth	157	57	60	19	20	26	52	26	0	0	17	39	599	7	199	101	38	7	20
Essex, Second	185	82	94	8	1	36	86	32	0	0	6	49	785	75	265	361	67	0	23
Barnstable, First	408	246	129	33	0	71	125	68	0	0	32	128	1,891	98	580	720	142	10	20
Barnstable, Second	257	158	79	19	1	37	73	31	4	0	26	1,072	527	28	113	131	45	2	10
Berkshire, Southern	121	95	17	8	1	3	16	2	1	0	6	136	356	16	113	149	24	0	18
Natick	241	116	96	28	1	29	92	26	6	1	40	140	784	19	201	387	16	0	12
Lee	42	20	18	3	1	8	18	6	0	0	2	65	538	2	122	263	26	5	15
Hampshire, Eastern	84	24	54	6	0	13	54	13	1	0	3	39	70	4	106	67	2	1	20
Franklin, Eastern	39	33	4	2	0	2	4	2	0	0	4	30	264	3	69	98	13	2	6
Essex, Third	113	59	26	11	17	11	25	8	0	0	15	16	284	15	106	40	22	2	15
Winchendon	74	49	22	3	0	4	22	4	1	0	3	4	166	5	85	44	19	3	15
Dukes County	83	61	17	4	1	7	9	4	0	0	10	153	252	15	64	99	13	0	17
Williamstown	51	43	4	3	1	0	4	0	0	0	7	12	103	0	35	24	10	0	0
Nantucket	39	31	3	4	1	2	3	2	0	0	1	34	129	11	22	55	10	4	17
Total	80,056	32,036	32,403	14,651	965	8,887	27,800	7,761	339	42	9,038	22,881	159,273	7,026	71,542	46,475	5,451	844	6887

ADDITIONAL INFORMATION—Total Motor tort cases removed.....7,761
Removed by plaintiff.....3,432
Removed by defendant 4,277
Removed by both..... 52

Neglected Children Total..... 977
Search warrants Total.....2,446
Inquests Total..... 146

Municipal Court of the City of Boston
Civil Actions (Other than Small Claims Cases)

Year	Entered	Removed	Per Cent	All Defaults	Per Cent of Entries	Tried	Per Cent of Entries	Total Plaintiffs' Judgments	Average Plaintiffs' Judgment Contract only	Heard, Appellate Division	Per Cent of Trials	To Supreme Judicial Court
1913	14,005	441	3.1	7,067	50	1,735	12	$1,008,147	$115.10	74	4.2	11
1914	15,173	501	3.3	7,681	50	1,676	11	976,320	103.45	88	5.2	18
1915	16,077	401	2.4	7,848	49	1,587	10	-	-	-	-	0
1916	16,095	401	2.4	7,707	47	1,760	11	1,117,059	104.69	93	5.8	19
1917	15,552	424	2.7	7,189	46	1,745	11	1,203,926	126.58	88	5.0	10
1918	12,786	380	2.9	6,381	49	1,290	10	1,043,886	120.32	84	6.5	6
1919	12,204	408	3.3	5,511	45	1,554	12	925,275	157.46	76	4.8	24
1920	13,702	477	3.4	6,078	44	1,745	12	1,065,379	132.97	94	5.4	18
1921	18,640	677	3.6	7,302	39	2,203	11	1,563,293	146.82	93	4.2	15
1922	19,948	476	2.386	10,106	50	2,201	11	1,877,970	154.10	106	4.8	10
1923	21,805	746	3.4	10,589	48	2,397	11	2,019,262	158.49	77	3.2	20
1924	23,820	907	3.8	11,239	47	2,636	11	2,256,391	149.86	79	3.0	14
1925	26,482	1,263	4.8	13,149	49	2,661	10	2,529,877	156.28	103	3.8	18
1926	30,830	1,505	4⅞	15,184	49	2,928	9	2,980,009	163.74	92	3.1	22
1927	36,025	1,303	3.6	18,129	50	3,342	9.2	3,579,613.41	152.05	104	3.1	21
1928	37,441	1,039	2.7	19,181	51	3,740	9.9	3,146,170.07	148.13	141	3.7	14
1929	39,676	992	2.5	20,114	50	3,863	9.7	4,154,206.96	154.00	112	2.9	14
1930	39,557	1,251	3.2	17,235	43	4,131	10	5,035,129.23	181.61	118	2.8	9
1931	39,948	1,235	3.1	12,356	31	4,290	11	5,141,389.85	210.40	107	2.5	14
1932	38,103	1,199	3.1	12,155	31	4,160	11	4,935,040.65	212.92	143	3.4	16
1933	31,421	1,189	3.7+	10,463	33+	3,584	11+	4,514,361.80	242.56	132	3.+	30
1934	30,825	1,450	4.7	9,626	31	3,475	11	4,132,030.25	233.14	149	4.5+	13

The jurisdictional limits in civil cases from 1866 to 1877 were $300; from 1877 to 1894, $1,000; from 10894 to 1922, $2,000; from 1922 to September 1, 1929, $5,000; since September 1, 1929, the jurisdiction has been unlimited in amount.

Subdivision—Contract and Tort 1926-1935

Year	Entered		Removed				Tried	
	Contract	Tort	Contract	Per Cent of Entries	Tort	Per Cent of Entries	Contract	Tort
1926	24,475	5,485	1,256	(5)	249	(4)	1,728	1,007
1927	28,346	6,812	1,099	(3)	203	(3)	1,927	1,255
1928	29,141	7,168	876	(3)	159	(2)	1,895	1,519
1929	31,110	7,130	779	(2)	181	(2)	2,096	1,515
1930	29,607	8,328	815	(3)	410	(5)	2,203	1,654
1931	28,930	9,917	719	(2)	480	(5)	2,030	1,990
1932	28,674	7,693	865	(3)	306	(4)	1,978	1,855
1933	22,875	6,882	699	(3)	462	(7)	1,740	1,544
1934	19,792	9,218	511	(2)	898	(10)	1,451	1,712
1935 9 Mos.	13,794	8,397	401	(3)	2,046	(24)	891	1,260

In 1934 there were also 1857 supplementary process cases and 961 small claims cases in this court (see Appendix B).

Criminal Statistics, Municipal Court of the City of Boston, for the Year Ending September 30, 1935

Cases Pending (including Defaults before Trial)	284
Cases Begun	31,952
Discharged, Nol Prossed and Placed on File	403
Pleas of Guilty	9,872
Pleas of Not Guilty, including Pleas of Nolo Contendere	5,432
Findings of Guilty, on Plea or Trial	15,170
Findings of Not Guilty	1,741
Bound Over	626
Sentences Appealed to Superior Court	2,003

MOTOR VEHICLE OFFENCES

Summons Issued:	
Violation Automobile Law	1,812
Violation Automobile Law, Appealed	135
Violation Traffic Rules	5,632
Violation Traffic Rules, Appealed	104
Number of Inquests	13*

PARKING LAW (ST. 1934 C. 00) EFFECTIVE OCTOBER 1, 1934

Penalties: First Offence, $3.00; Second Offence, $5.00; Third Offence, $10.00.
February 5, 1935, Changed to First Offence $2.00, Second Offence, $3.00; Third Offence, $5.00.

Total Number of Tags, October 1, 1934, to April 16, 1935	17,495
Total Number Paying, October 1, 1934, to April 16, 1935	14,179
Amount Paid in Clerk's Office, October 1, 1934, to April 16, 1935	$41,868

This amount was paid to April 16, 1935, when law was again changed (St. 1935 C. 00) as it now stands:
First Offence, Warning; Second Offence, $1.00; Third Offence, $2.00.

Tags Issued to Police from this Office April 16 to November 12, 1935	31,000
Tags Issued by Police and Returned to Office by Offenders	29,145
Amount of Money in Penalties Paid in this Office Since April 16, 1935:	
Under the New Law (Estimate)	$3,400

BOSTON JUVENILE COURT

The Boston Juvenile Court, created in 1906, is a separate court with jurisdiction in juvenile cases in the central district of Boston.

Entries for the Year Ending September 30, 1935

Delinquent, 727; juvenile criminal, 4; neglected, 28; adult criminal, 4. Total, 763.

In connection with these figures, it should be remembered that in many of the cases the boy is placed on probation or otherwise kept under supervision by the court through the probation officer and that in addition to the "cases" of new complaints entered on the docket and reported in the annual returns to the Department of Correction, the advice and assistance of the judge is constantly sought by parents in informal conferences in cases which do not reach the stage of a formal complaint by anyone.

TRIAL JUSTICES

There were presented to the ten trial justices now in the Commonwealth during the year 1,657 criminal cases as shown below. Trial justices have no civil jurisdiction.

Criminal Cases before Trial Justices For the Year Ending September 30, 1935

Trial Justice	Cases Pending Sept. 30, 1934	No. Cases Begun During Year	No. Cases Appealed	No. Cases Bound Over to Grand Jury	No. Cases Pending Sept. 30, 1935
Colver J. Stone, Andover	–	172	–	–	–
Cornelius J. Mahoney, North Andover	–	–	–	–	–
John L. Smith, Barre	–	56	1	3	–
John R. Healy, Hardwick	–	45	1	4	–
Daniel J. Riley, Hopkinton	1	16	1	–	–
Fred E. Morris, Hudson	2	102	0	3	8
George B. Haas, Ludlow	–	275	7	1	–
Luke B. Colbert, Marblehead	2	227	–	47	6
Walter H. Southwick, Nahant	–	–	–	–	–
William S. Ludden, Saugus	7	764	4	6	–
Totals	12	1657	14	64	14

No answer was received from North Andover and Nahant.

*The fact that there were 150 Medical Examiner's reports on which an inquest would have been mandatory under the law before 1932, and that in only 13 cases was an inquest really needed shows that St. 1932, ch. 118, eliminating the mandatory provision has saved much needless expense of money and judicial time.

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Of the 109,394 accident reports filed with the department during the year 1934, 35,217 were for injuries causing the loss of at least one day or one shift, called in the report of the department "tabulatable injuries." Of this latter number 1,347 cases were not insured, and how many of them ripened into lawsuits we do not know. Neither can we know how many of the remaining 33,870 cases would in fact have gone before our courts if they had not been adjusted before the Industrial Accident Board, but 231 of these 35,217 cases resulted in death, 9 in permanent total disability, 853 in permanent partial disability, and that 66.5 per cent of the remainder represent a temporary disability of more than a week. The Board is not a court, but an administrative commission. It was in part created to relieve our courts of the congestion of cases growing out of the relation of master and servant. In addition to its administrative duties, the Board, and its members, hold several thousands of hearings each year to determine questions of fact and law arising under the Workmen's Compensation Act.

There was paid by the various authorized insurance companies operating under this act the sum of $6,159,612.31 during the year 1934 at a gross cost of $194,937.16. As there were receipts of $16,875.47 to be credited, the net cost to the Commonwealth was $178,061.69.

Department of Industrial Accidents

1927 - 1934

	Accident Reports Filed	"Tabulated Injuries"	Not Insured	Resulting in Death	Permanent Total Disability	Permanent Partial Disability	Temporary Disability
1927	168,057	64,167	5,221	317	17	1,232	61.5 of remainder
1928	158,990	60,330	3,989	340	12	1,197	62.4 " "
1929	160,183	60,195	2,967	353	4	1,352	61.9 " "
1930	170,663	61,741	2,658	344	7	1,179	64.3 " "
1931	144,133	50,006	2,018	282	5	1,031	65 " "
1932	123,517	42,067	1,553	222	7	864	66.7 " "
1933	96,144	31,769	1,207	162	8	602	67.5 " "
1934	109,394	35,217	1,347	231	9	853	66.5 " "

	Compensation Paid by Companies	Gross Cost to Commonwealth	Receipts	Net Cost to Commonwealth
1927	$8,018,634.38	$194,550.00	$17,330.79	$177,219.21
1928	8,976,147.18	228,694.59	19,937.30	208,757.29
1929	9,461,962.31	207,165.78	25,518.50	181,647.28
1930	9,861,383.09	214,907.16	26,819.42	188,087.74
1931	8,978,058.04	229,586.89	33,740.28	195,846.61
1932	7,820,043.54	219,557.79	29,026.25	190,531.54
1933	5,856,868.43	202,023.48	23,508.11	178,515.37
1934	6,159,612.31	194,937.16	16,875.47	178,061.69

BOARD OF TAX APPEALS

The state Board of Tax Appeals is an administrative tribunal, to which have been transferred some of the functions formerly imposed on the Superior Court. It came into existence on December 1, 1930, under St. 1930, ch. 416, later amended a number of times and most recently by St. 1935, ch. 447.

Summary of Real Estate Tax Appeals

COMBINED FORMAL AND INFORMAL PROCEDURE

(The State, as a whole)	1931	1932	1933	1934	1935
Total appeals pending at beginning of year	0	145	834	2,396	3,248
Total appeals entered (net) during year	235	1,067	2,763	3,366	4,457
Total number before Board during year	235	1,212	3,597	5,762	7,705
Less: Settled or withdrawn during year	59	250	839	1,937	3,003
Net total to be decided by Board	176	962	2,758	3,825	4,702
Appeals decided by Board during year	31	128	362	577	468
Appeals pending at end of year	145	834	2,396	3,248	4,234

Appeals from Commissioner of Corporations and Taxation

	1931	1932	1933	1934	1935
Pending at beginning of year	0	27	26	24	16
Entered during year	66	47	42	25	31
Total	66	74	68	49	47
Settled or withdrawn during year	9	14	17	15	8
Net	57	60	51	34	39
Decided	30	34	27	18	7
Pending at end of year	27	26	24	16	32

Results of Appeals to Supreme Judicial Court

	Sustained by S. J. C.	Reversed by S. J. C.
1931	1	0
1932	6	2
1933	2	1
1934	4	0
1935	5	0
Total	18	3

Detailed statistical tables of various courts will be found in Appendix B.

Respectfully submitted,

T. HOVEY GAGE, *Chairman*,
FREDERICK LAWTON,
CHARLES THORNTON DAVIS,
WILFRED BOLSTER,
ARTHUR W. DOLAN,
CHARLES L. HIBBARD,
HERBERT B. EHRMANN,
FRANCIS R. MULLIN.

MEMORANDUM BY MR. EHRMANN

The current report of the Judicial Council contains recommendations for very important changes in the administration of justice, principally in the direction of enlarging the civil, domestic and criminal jurisdiction of the district courts. I am heartily in accord with this movement to use the district courts to their capacity and to create thereby a great trial court close to the people and promptly responsive to their needs. Such a result, however, is not dependent merely upon the shifting of jurisdiction or the improvement of judicial machinery. It is perhaps a truism to say that no court can rise above the quality of the judges who staff it and yet I rather fear that this self-evident principle may be lost to view unless constantly kept in the foreground. I believe that a large portion of the bar is convinced that during the past ten or fifteen years merit has frequently not been the decisive factor in appointments to the district courts. Some of the difficulty has undoubtedly been due to the Siamese twin handicaps of part-time service and inadequate salary, but probably also, occasionally, to a mistaken belief that the district courts are unimportant and therefore nominations to them offer a harmless method of liquidating purely political obligations. Such appointments not only injure the particular court to which they are made and lead to a lowered public confidence, but tend further to discourage the many sterling citizens already on this bench who by their character and self-sacrifice have won the esteem of their respective communities. In considering the future of the district courts, therefore, it would seem to be vital that the same high standards of character and capacity should be demanded of its judicial appointments as have generally been recognized in Massachusetts as applicable to more conspicuous, but no more important, branches of our administration of justice.

HERBERT B. EHRMANN.

APPENDIX A

Commonwealth of Massachusetts

SUFFOLK ss. SUPERIOR COURT

NOTICE TO THE BAR

[of June 20, 1935]

Pre-Trial Call of List of Jury Cases for the Week Beginning Monday, August 26, 1935

Commencing with the September Jury Sessions in Suffolk County the short list of cases for trial shall be composed exclusively of cases which have passed the Pre-Trial call and such other cases as may be added by the Justice having direction of the lists.

All requests for continuance or delay of trial must be made at the Pre-Trial call. After a case has once passed to the short list from the Pre-Trial call no continuance shall be granted except for cause thereafter arising and not due to the fault of the parties or their counsel.

The special order with respect to engagements of counsel passed by the Justices on April 13, 1935, to become effective September 1, 1935, applies to all cases on the short list, but such hardship as may be caused by this rule particularly to attorneys having a substantial number of cases may be avoided to a large extent by limiting at the Pre-Trial call the number of cases which pass to the short list at each Pre-Trial call.

There will be no call of the list except the Pre-Trial call. Attorneys having cases on the short list will receive notice when their cases are reached for trial in the manner hereinafter explained.

The first Pre-Trial call will be held daily during the week commencing Monday, August 26, 1935, in Room No. 220, before Gray, J. The list will be composed of those cases next in order at the conclusion of the July jury sessions, and on or about August first notice will be sent to each attorney having a case on the Pre-Trial List of the day and as nearly as possible the hour when his case will be reached.

At the Pre-Trial call the Presiding Justice will consider with counsel—

(1) Whether the pleadings are in proper shape;

(2) Whether the case is then ready for trial;

(3) Whether the issues of the case may be simplified for trial, including also whether agreements may be made to avoid the bringing to court of unnecessary witnesses, whether the number of expert witnessed may be limited, and other similar preliminary matters;

(4) Whether the case may be settled with or without the aid of the Presiding Justice. If there is reasonable likelihood that the parties may arrange a settlement, the case, with the permission of the court, may stand over to a later Pre-Trial call instead of passing immediately to the short list for trial.

From the foregoing, it will be apparent that the litigants must be represented at the Pre-Trial call by an attorney having full power to act in all matters pertaining to the case. It is entirely in order for the client also to be present at the Pre-Trial call.

It is likewise necessary that the case be fully investigated as to its readiness for trial before the Pre-Trial call, in view of the rule above

stated limiting continuances on the short list to causes arising after the Pre-Trial call. It is also desirable that preliminary negotiations for settlement should be had to the same extent as if the case were about to be reached on the present short list.

It should be understood that in the event of failure of parties to appear or be properly represented at the Pre-Trial call the Court has the same power with respect to non-suits, defaults, or both as it has heretofore exercised when a case is reached for trial. The Court expects, however, that this power will be sparingly used, because the great benefits that have been enjoyed in other places where the Pre-Trial call has been in operation and which may reasonably be expected here, depend upon the fullest co-operation between the bench and bar, and with that co-operation the power to non-suit and default will be practically unnecessary.

New Method of Handling the Jury Short List in Suffolk

As already stated there will be no call of the civil jury list other than the Pre-Trial call. This means that when a case passes to the short list from the Pre-Trial list, it is then ready for trial and will continue ready until actually reached. As already stated, it also means that no excuse for continuance will be accepted except for cause thereafter arising. Should such cause arise, it should be promptly brought to the attention of the Justice in charge of the list in the Motion Session after notice to the other side. Engagements of counsel likely to interfere with the trial of cases when reached should also be brought before the Justice in charge of the list after notice to the other side, in order that the court may fix the date within the ten-day period on which the case must be tried.

Not later than the Friday preceding the opening of the Jury sessions the Clerk in charge of the list will notify counsel in the cases first on the list which are to be ready for trial in each of the sessions at 10 A.M. on the opening day.

A sufficient number of cases to keep the sessions busy will be determined for each day by the Justice and Clerk in charge of the list and each of these cases will be entitled to receive two notices by telephone from the List Clerk. The day before the case is held for trial each counsel will be notified by the Clerk that he must have his case ready for trial the next day and when the case is actually reached he will receive a notice at least fifteen minutes before he is needed in the session.

Since the short list is composed of cases which are actually ready for trial and in which the possibilities of settlement have been practically exhausted at the Pre-Trial call, it will be unnecessary to hold for trial each day the large number of cases heretofore held and for this reason it is expected that much time of counsel and witnesses in waiting for trial will be saved.

Information about the short list and the prospect of any case on the list being reached for trial may be had by visiting or telephoning the List Clerk at his office, Room 170, Court House. He may be reached by calling Capitol 0351 or other numbers of which the bar will receive seasonable notice. He will have in his office a blackboard for each session on which the progress of each case will be kept up to date.

Lists for Sessions without Jury and Jury "A"

There will be no call of these lists except the assessment and demurrer list, which will be called as heretofore on Mondays at 9.30 in the Motion Session.

Not later than Friday before the opening day of Jury "A" and Jury Waived sessions, the List Clerk will notify counsel in the cases which are to be ready at 10 A.M. on the opening day of the sessions. A sufficient number of cases to keep the sessions busy will be determined for each day by the Justice and Clerk in charge of the list and each of these cases will be entitled to receive two notices by telephone from the List Clerk. The day before the case is held for trial each counsel will be notified that he must have his case ready for trial the next day and when the case is actually reached he will receive a notice at least fifteen minutes before he is needed in the session.

Counsel should promptly bring to the attention of the Justice in charge of the list, after notice to the other side, requests for delay or continuance and engagements of counsel that may require the application of the new ten-day rule.

This new method of handling these lists is designed to save the time of counsel in attendance at calls and so far as possible to reduce to the minimum the amount of time spent by counsel and witnesses waiting to be reached and in order to accomplish these purposes requires the fullest co-operation of counsel in marking only cases in which trial is intended, in having cases ready for trial when reached and in promptly bringing to the attention of the court all matters which may involve continuances.

Copies of all lists will be mailed to counsel as heretofore.

The new regulations respecting the short lists will go into effect September 3, 1935.

By the Court, (Gray, J.)

FRANCIS A. CAMPBELL,
Clerk.

June 20, 1935.

STATISTICAL TABLES

Table of Cases Decided by the Supreme Judicial Court, 1875-1935

Court Year Ending Aug. 31	Number of Cases Decided	Reported in the Following Volumes of Massachusetts Reports	Court Year Ending Aug. 31	Number of Cases Decided	Reported in the Following Volumes of Massachusetts Reports
1875	394	115–118	1905	384	186–188
1876	418	118–120	1906	484	188–192
1877	403	120–123	1907	441	192–196
1878	388	123–125	1908	397	196–199
1879	334	125–127	1909	413	199–203
1880	316	127–129	1910	358	203–206
1881	372	129–131	1911	390	206–209
1882	293	131–133	1912	388	209–212
1883	344	133–135	1913	427	212–215
1884	374	135–137	1914	472	215–218
1885	367	137–140	1915	432	218–221
1886	385	140–142	1916	433	221–224
1887	399	142–145	1917	417	224–228
1888	321	145–147	1918	391	228–231
1889	349	147–149	1919	340	231–233
1890	344	149–152	1920	341	233–236
1891	321	152–154	1921	378	236–239
1892	422	154–157	1922	356	239–242
1893	354	157–159	1923	397	242–246
1894	341	159–162	1924	422	246–249
1895	333	162–164	1925	419	249–253
1896	356	164–166	1926	483	253–257
1897	371	166–169	1927	515	257–261
1898	397	169–172	1928	467	261–264
1899	339	172–174	1929	496	264–267
1900	366	174–176	1930	487	268–271
1901	381	176–179	1931	459	271–276
1902	381	179–182	1932	427	276–280
1903	348	182–184	1933	404	280–283
1904	354	184–186	1934	423	283–287
			1935	493*	287–291

*Of these, one was an Answer of the Justices and four were Opinions of the Justices. During this period there were three cases decided in which there was filed a rescript but no opinion.

References to Auditors and Masters in the Superior Court

County	1933		1934		January 1 to September 30, 1935	
	Auditor	Master	Auditor	Master	Auditor	Master
Barnstable	6	6	12	8	8	8
Berkshire	8	9	8	3	12	5
Bristol	14	35	7	35	22	37
Essex	16	19	20	48	96	32
Franklin	14	8	1	9	3	7
Hampden	26	50	5	23	125	21
Hampshire	22	19	12	8	45	7
Middlesex	21	72	12	71	116	50
Norfolk	12	24	16	13	132	7
Plymouth	14	29	7	10	165	13
Suffolk	75	268	22	96	519	108
Worcester	37	48	14	36	305	33
	265	587	136	360	1,548	328

Two or more cases tried together are counted as one reference.

Auditors, Masters and Referees Amounts Expended 1925-1934 By Counties

County	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934
Barnstable	$795 83	$631 23	$1,066 58	$1,231 94	$692 90	$2,316 03	$569 27	$1,491 25	$2,973 01	$2,128 65
Berkshire	1,227 92	1,535 80	3,225 60	2,103 61	5,864 27	2,796 39	2,987 08	6,173 25	2,355 59	1,789 04
Bristol	3,468 36	4,959 28	5,333 79	5,497 40	9,140 57	7,159 43	9,212 01	9,975 70	7,476 50	3,587 74
Dukes	15 00	202 71	98 90	381 24	321 27	90 00	103 75	–	–	–
Essex	15,278 77	13,531 28	14,570 83	14,658 94	16 316 63	10 413 48	9,031 47	35,547 62	21,259 22	5,718 87
Franklin	347 00	1,673 14	1,249 42	795 83	2,065 83	912 50	1,097 50	1,690 81	1,201 49	959 80
Hempden	6,219 79	15,362 85	13,411 80	9,484 62	12,887 65	19,649 79	15,996 92	21,294 31	19,045 76	8,392 10
Hampshire	1,487 18	1,815 21	2,321 39	1,733 79	471 99	2,434 92	1,659 17	3,065 00	3,648 51	1,403 99
Middlesex	28,184 55	23,864 70	23,976 96	22,853 33	21,666 94	28,074 70	26,806 58	50,717 47	39,164 50	16,679 82
Nantucket	92 50	50 00	–	–	–	530 00	100 00	265 00	453 12	51 00
Norfolk	4,241 13	4,953 15	3,941 73	12,993 35	10,308 72	6,979 17	11,336 55	17,839 56	13,625 44	7,249 98
Plymouth	5,066 60	8,374 77	5,703 12	4,795 07	6,672 63	7,100 40	8,635 59	9,645 82	8,832 48	3,809 20
Suffolk	94,313 05	59,027 78	67,920 79	66,906 72	68,598 79	73,730 92	85,501 17	116,377 42	74,324 36	37,713 81
Worcester	11,707 43	10,471 07	10,341 14	18,810 35	6,827 78	8,164 13	8,977 14	34,233 25	21,702 05	12,176 94
	$172,445 11	$146,452 97	$153,162 05	$162,246 19	$161,385 97	$170,351 86	$182,014 20	$308,316 46	$216,062 03	$101,660 94

Note: In Suffolk County these figures apply to the Superior Court (civil) only. In other counties to all courts, but probably the major portion applies to the Superior Court. While the expenditures under the heading "Auditors, Masters and Referees" are not segregated in the County Treasurer's reports, it is probable that the major portion of the above amount is chargeable to the Superior Court.
During the first 9 months of 1932 auditors were used in many tort cases.

NOTE: In Suffolk County these figures apply to the Superior Court (civil) only. In other counties to all courts, but probably the major portion applies to the Superior Court. While the expenditures under the heading "Auditors, Masters and Referees" are not segregated in the County Treasurer's reports, it is probable that the major portion of the above amount is chargeable to the Superior Court.
During the first 9 months of 1932 auditors were used in many tort cases.

Abstract and Tabular Statement of the Returns Relative to the Law, Equity, Divorce and Criminal Business of the Superior Court

FOR THE YEAR ENDING JUNE 30, 1935, IN COMPLIANCE WITH GENERAL LAWS, CHAPTER 221, SECTION 24, AS AMENDED
(Naturalization Business not included)

COUNTIES	CIVIL CASES										
	NUMBER PENDING AT BEGINNING OF YEAR			NUMBER OF NEW CASES ENTERED DURING THE YEAR			NUMBER DISPOSED OF IN PREVIOUS YEARS AND BROUGHT FORWARD THIS YEAR			NUMBER TRANSFERRED FROM LAW TO EQUITY	NUMBER TRANSFERRED FROM EQUITY TO LAW
	Law	Equity	Divorce and Nullity	Law	Equity	Divorce and Nullity	Law	Equity	Divorce and Nullity		
Barnstable	360	44	–	167	19	–	–	–	–	–	–
Berkshire	534	127	–	284	24	–	–	–	–	–	–
Bristol	2,037	414	1	975	128	–	–	–	–	–	–
Dukes	45	4	3	15	2	–	–	–	–	–	–
Essex	6,103	771	–	2,041	240	–	–	–	–	–	2
Franklin	230	64	–	129	10	–	–	–	–	–	1
Hampden	4,317	586	43	1,904	170	4	–	–	–	–	–
Hampshire	444	78	2	232	17	–	–	–	–	–	–
Middlesex	10,804	1,294	5	3,574	404	1	27	4	–	1	3
Nantucket	52	1	–	23	1	–	–	–	–	–	–
Norfolk	3,643	323	5	1,111	80	2	–	–	–	–	–
Plymouth	1,403	230	98	456	67	58	3	1	–	2	–
Suffolk	30,205	5,268	16	8,991	1,546	–	10	–	–	5	8
Worcester	5,985	532	2	2,173	173	1	–	–	–	–	–
Total	66,171	9,736	175	22,075	2,881	66	40	5	–	8	14

Abstract and Tabular Statement of the Returns Relative to the Law, Equity, Divorce and Criminal Business of the Superior Court—Continued

Counties	CIVIL CASES												
	Number Finally Disposed of				Number Pending at End of Year, including Pending Inactive Cases				Number Tried during Year				Number of Equity Cases in which Issues were Tried to a Jury
	Law		Equity	Divorce and Nullity	Law		Equity	Divorce and Nullity	Law		Equity	Divorce and Nullity	
	Jury	Without Jury			Jury	Without Jury			Jury	Without Jury			
Barnstable	151	17	11	–	292	67	52	–	33	5	3	–	–
Berkshire	250	34	12	–	454	80	139	–	40	8	6	–	–
Bristol	833	146	77	–	1,677	356	465	1	220	37	8	–	–
Dukes	18	2	5	–	24	16	1	3	3	1	–	–	–
Essex	2,150	152	208	–	5,102	742	805	–	254	109	75	–	2
Franklin	130	11	17	–	180	48	57	–	26	7	14	–	–
Hampden	1,524	135	124	7	4,022	540	632	40	196	37	27	4	2
Hampshire	212	10	5	–	389	64	90	2	66	2	–	–	–
Middlesex	3,615	191	376	1	9,577	1,025	1,327	5	411	114	66	1	1
Nantucket	10	7	2	–	25	33	–	–	2	1	2	–	–
Norfolk	1,087	65	61	1	2,891	711	342	6	115	23	9	3	–
Plymouth	484	47	48	68	1,162	169	252	88	109	13	6	54	1
Suffolk	10,016	1,080	1,497	–	23,201	4,917	5,322	16	741	425	388	–	4
Worcester	2,765	311	382	–	4,805	277	323	3	144	35	51	–	1
Total	23,245	2,208	2,285	77	53,801	9,045	9,807	164	2,360	817	655	62	11

Abstract and Tabular Statement of the Returns Relative to the Law, Equity, Divorce and Criminal Business of the Superior Court—Continued

Counties	CIVIL CASES													
	Number Awaiting Trial at End of Year				Number Marked Inactive during the Year under Rule of the Court				Number Marked Inactive at any Time Pending at End of Year, and Subject to Dismissal under the Rule				Number of Days during which Court has Sat for Hearings or Trials	
	Law		Equity	Divorce and Nullity	Law		Equity	Divorce and Nullity	Law		Equity	Divorce and Nullity	Law	
	Jury	Without Jury			Jury	Without Jury			Jury	Without Jury			Jury	Without Jury
Barnstable	284	57	38	–	17	6	2	–	55	24	16	–	23½	4½
Berkshire	423	55	72	–	24	3	18	–	75	25	57	–	48	5
Bristol	1,580	171	148	1	118	34	55	–	233	94	130	–	137	50
Dukes	–	–	–	–	–	–	–	–	–	–	–	–	4[1]	–
Essex	5,082	721	685	–	435	109	10	–	1,110	304	298	–	287	96
Franklin	76	8	16	–	11	5	6	–	45	20	13	–	32	5
Hampden	4,004	537	621	39	251	96	91	6	730	284	263	35	170	64
Hampshire	320	53	34	2	29	8	7	–	71	26	35	–	42	3
Middlesex	9,413	995	1,174	2	986	147	127	1	1,320	245	489	1	449	209
Nantucket	25	33	–	–	–	–	–	–	–	–	–	–	3	–
Norfolk	2,870	711	341	3	355	38	47	–	885	122	125	2	139	31
Plymouth	1,082	147	242	66	83	27	31	9	249	84	97	22	84	21
Suffolk	20,619	3,848	4,672	11	1,740	637	795	3	6,058	2,274	2,786	14	1,168	1,076
Worcester	4,695	255	296	3	148	3	1	–	853	140	152	–	198	112
Total	50,473	7,591	8,339	127	4,197	1,113	1,190	19	11,684	3,642	4,461	74	2,784½	1,676½

[1]For all types of cases, civil and criminal.

Abstract and Tabular Statement of the Returns Relative to the Law, Equity, Divorce and Criminal Business of the Superior Court—Concluded

Counties	CRIMINAL CASES									
	Number remaining at first of year.	Number of Indictments returned.	Number of appeal cases.	Number of actions on bail bonds or recognizances entered.	Number disposed of in previous years brought forward for redisposition.	Number disposed of during year.	Number remaining at end of year.	Number tried during year.	Number awaiting trial at end of year.	Number of days during which Court has sat for trials, hearings or dispositions.
Barnstable	37	40	113	–	3	162	31	16	18	9
Berkshire	84	36	108	–	–	151	77	36	69	19
Bristol	210	420	388	1	10	847	182	117	159	82
Dukes	23	2	11	–	–	15	21	–	–	–[1]
Essex	199	537	1,254[2]	21	35	1,886	160	270	119	193
Franklin	55	53	52	–	1	87	74	68	35	8½
Hampden	167	168	239	5	1	357	223	54	223	42
Hampshire	141	39	147	–	23	236	114	61	51	36½
Middlesex	634	1,371	1,564	14	147	2,892	838	490	697	321
Nantucket	5	3	10	–	–	5	13	5	13	2
Norfolk	510	347	556[2]	2	136	1,230	221	131	194	98
Plymouth	334	539	307	36	121	1,017	320	112	88	96
Suffolk	700	1,233	4,560	104	428	6,345	680	1,693	606	858
Worcester	43	429	615[2]	22	41	1,130	20	226	17	164
Total	3,142	5,217	9,924	205	946	16,360	2,974	3,279	2,289	1,929

[1] For all types of cases, civil and criminal.
[2] Number of appeal cases includes waivers of indictment.

Municipal Court of the City of Boston for Civil Business

SUMMARY, A.D. 1934

	Actions Entered—Total	Actions Entered—Over $6000 Ad Damnum	Actions Removed to Superior Civil Court—Total	Actions Removed to Superior Civil Court over $6000 Ad Damnum	Dept. Default Clerk		Dept. Default Court		Invol. Filed		Marked for		Trial List				Findings		Appellate Division					
					Non-Appearance	Non-Answer	Non-Appearance	Non-Answer	To Plaintiff	To Defendant	Motion List	Trial List	Non-Suits	Defaults	Tried	Reserved	For Plaintiff	For Defendant	Requests for Report	Reports Allowed	Reports Disallowed	Petitions to Establish	Reports Proved	Cases Heard	Cases Decided
Contract	19,792	241	511	84	7,627	30	131	654	462	1,464	-		-	-	1,451	665	1,055	373	170	82	15	9	-	74	64
Tort	9,218	641	808	243	480	-	6	56	3,545	1,885	-	-	-	-	1,712	633	915	770	222	59	9	3	-	58	54
Contract or Tort	650	31	41	11	78	-	-	2	134	108	-	-	-	-	126	105	-	70	25	12	6	3	-	9	8
All others	1,165	-	-	-	551	6	4	1	11	20	-	-	-	-	186	26	149	45	11	10	3	1	-	8	5
Totals	30,825	913	1,450	338	8,736	36	141	713	4,152	3,477	15,607	21,509	422	3,098	3,475	1,729	2,119	1,264	428	163	33	16	-	149	131

[1] For all types of cases, civil and criminal.
[2] Number of appeal cases includes waivers of indictment.

Municipal Court of the City of Boston for Civil Business

SUMMARY, A.D. 1934

	Appellate Division—*Concluded*									Appeals to Superior Civil Court	Defendants' Judgments						Plaintiffs' Judgments				Original Executions Issued	Executions Renewed
	Affirmed	Reversed	Modified	Entire Re-Trial Ordered	Partial Re-Trial Ordered	Motions	Appeals to Supreme Judicial Court	Appeals to Supreme Judicial Court—Petitioned	Appeals to Supreme Judicial Court—Affirmed	Appeals to Supreme Judicial Court—Reversed		Entered by Non-Suit	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Defendants' Judgments	Entered by Default	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Plaintiffs' Judgments	Amount of Plaintiffs' Judgments	Average Amount of Plaintiffs' Judgments		
Contract	51	10	1	2	-	11	30	7	10	-	-	83	157	216	84	510	11,211	629	426	2,386	14,652	$3,416,022 25	$233 14	13,707	15
Tort	43	6	1	4	-	7	21	4	2	3	-	153	308	462	30	962	-	470	445	3,589	4,504	715,061 85	158 76	1,157	-
Contract or Tort	7	1	-	-	-	-	2	-	-	-	-	15	22	54	2	93	-	-	-	-	-	-	-	-	-
All others	4	1	-	-	-	2	3	2	2	1	4	13	25	20	2	60	634	135	14	39	822	946 15	-	655	-
Totals	105	18	2	6	-	20	56	13	14	4	4	264	512	752	97	1,625	11,845	1,234	885	6,014	19,978	$4,132,030 25	$206 82	15,519	15

Municipal Court of the City of Boston for Civil Business

SUMMARY, JANUARY THROUGH SEPTEMBER, 1935

	Actions Entered—Total	Actions Entered—Over $5000 Ad Damnum	Actions Removed to Superior Civil Court—Total	Actions Removed to Superior Civil Court over $5000 Ad Damnum	Dept. Default Clerk		Dept. Default Court		Intr. Filed		Marked for	Trial List			Findings		Appellate Division					
					Non-Appearance	Non-Answer	Non-Appearance	Non-Answer	To Plaintiff	To Defendant	Motion List	Trial List	Non-Suits	Defaults	Tried	Reserved	For Plaintiff	For Defendant	Requests for Report	Reports Allowed	Reports Disallowed	Petitions to Establish	Reports Proved	Cases Heard	Cases Denied
Contract	13,704	233	401	92	5,280	22	92	350	203	1,187	1	-	-	-	801	377	604	267	149	74	19	4	-	56	55
Tort	8,397	1,176	2,046	761	473	-	4	30	4,115	1,775	-	-	-	-	1,260	601	743	593	98	65	7	3	-	47	30
Contract or Tort	538	38	31	8	40	-	-	3	139	71	-	-	-	-	84	65	-	47	17	9	-	1	-	6	1
All others	843	-	-	-	394	4	3	6	-	5	-	-	-	-	125	13	109	35	4	2	-	-	-	-	1
Totals	23,572	1,446	2,478	851	6,195	26	99	398	4,548	3,038	1	-	-	-	2,360	1,146	1,516	942	268	150	26	8	-	109	87

Municipal Court of the City of Boston for Civil Business

Summary, January through September 1935

	Appellate Division—*Concluded*								Defendants' Judgments					Plaintiff's Judgments						Original Executions Issued	Executions Received
	Affirmed	Reversed	Modified	Entire Re-Trial Ordered	Partial Re-Trial Ordered	Motions	Appeals to Supreme Judicial Court	Appeals to Supreme Judicial Court—Reversed	Appeals to Supreme Judicial Court—Affirmed	Appeals to Supreme Judicial Court—Reversed	Appeals to Superior Civil Court	Entered by Non-Suit	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Defendants' Judgments	Entered by Default	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Plaintiffs' Judgment	Amount of Plaintiffs' Judgments	Average Amount of Plaintiffs' Judgments		
Contract	43	8	-	3	1	10	25	7	5	2	-	104	118	149	58	429	7,280	396	270	1,390	9,336	$2,150,145 45	$230 30	8,824	11
Tort	24	2	-	3	1	1	11	8	6	1	-	263	226	357	42	898	-	333	412	3,433	4,178	777,318 15	186 33	972	-
Contract or Tort	1	-	-	-	-	1	-	-	-	-	-	14	19	20	4	66	-	-	-	-	-	-	-	-	-
All others	1	-	-	-	-	-	-	-	-	-	1	4	17	17	2	40	475	95	10	27	607	1 00	-	513	-
Totals	69	10	-	6	2	12	36	15	11	3	1	385	390	552	106	1,433	7,755	824	692	4,850	14,121	$2,927,464 60	$207 31	10,309	11

Municipal Court of the City of Boston

SMALL CLAIMS

SUMMARY, A.D. 1934

	Actions Entered	Reported as Settled out of Court	Amount of Plffs.' Claims	Notice Mailed to Defts.	Notices Returned, Acceptance Refused	Notices Returned, Unable to Locate	Notice to Plffs.	Counter-Claims or Set-offs	Amount of Counter-Claims or Set-offs	Answers: Defendants	Answers: Plaintiffs	Settled in Court Before Hearing	Hearings	Settled in Court after Hearing	Reserved	Dismissals	Transferred for Trial
Contract	777	48	$16,736 88	777	1	33	5	5	$367 78	268	5	2	268	5	1	1	2
Tort	184	–	5,462 03	184	–	–	–	–	–	128	–	–	128	1	–	–	–
Totals	961	48	$22,198 91	961	1	33	5	5	$367 78	396	5	2	396	6	1	1	2

	Removed to Superior Court	Referred to Appellate Division	Judgments: Entered on Default	Entered on Non-Suit	Entered on Hearings	Total Plffs.' Judgments	Amount Plffs.' Judgments	Total Defts.' Judgments	Amount Defts.' Judgments	Judgments Vacated	Neither Party	Counter-Claims Dismissed	Counter-Claims Disallowed	Plffs.' Exons.—Original	Defts.' Exons.—Original
Contract	3	–	294	15	268	476	$10,149 71	101	–	1	3	–	3	170	–
Tort	–	–	* 1	8	128	90	1,685 97	46		–	1	–	1	–	–
Totals	3	–	294	23	396	566	$11,835 68	147	–	1	4	–	4	170	–

Municipal Court of the City of Boston

SMALL CLAIMS

Summary, January thru September 1935

	Actions Entered	Reported as Settled out of Court	Amount of Plffs.' Claims	Notice Mailed to Defts.	Notices Returned, Acceptance Refused	Notices Returned, Unable to Locate	Notice to Plffs.	Counter-Claims or Set-offs	Amount of Counter-Claims or Set-offs	Answers		Settled in Court Before Hearing	Hearings	Settled in Court after Hearing	Reserved	Dismissals	Transferred for Trial
										Defendants	Plaintiffs						
Contract	482	33	$10,194 92	482	–	22	4	4	$90 03	178	4	1	178	1	–	–	–
Tort	142	2	3,581 11	142	–	–	1	1	14 00	85	1	–	85	–	–	–	–
Totals	624	35	$13,776 03	624	–	22	5	5	$104 03	263	5	1	263	1	–	–	–

	Removed to Superior Court	Referred to Appellate Division	Judgments								Neither Party	Counter-Claims Dismissed	Counter-Claims Disallowed	Plffs.' Exons.—Original	Defts.' Exons.—Original
			Entered on Defaults	Entered on Non-Suits	Entered on Hearings	Total Plffs.' Judgments	Amount Plffs.' Judgments	Total Defts.' Judgments	Amount Defts.' Judgments	Judgments Vacated					
Contract	2	–	182	7	178	308	$6,462 90	57	–	–	–	1	1	122	–
Tort	–	–	–	1	85	54	954 35	32	–	1	–	1	–	30	–
Totals	2	–	182	8	263	362	$7,417 25	89	–	1	–	2	1	152	–

A CORRECTION.

On page 47 of the foregoing report of the Judicial Council the figure at the end of the last sentence before the "Draft Act" should be $500, instead of $50.

RECOMMENDATIONS OF THE JUDICIAL COUNCIL ADOPTED IN 1934–1935.

Chap. 164 of the Acts of 1934, relative to the imitation of judicial process.

This act was explained and recommended in the Eighth Report (pp. 48–49) and in the Ninth Report (p. 49). The Eighth Report contained descriptions of collection forms which were being used by some lawyers and by other persons with many of which the bar was familiar. As the Council said, "This sort of thing ought to be stopped". The Council expressed the belief that the act as drawn and finally adopted would be "largely self-enforcing". We gather from the information that has come to us from time to time that this prediction has been justified, to some extent at least, without any action by the courts. We shall be glad to receive information and copies as to any forms in use which are "drawn to resemble court process" in order that they may be called to the attention of the court if such action appears to be called for.

Chap. 358 of 1934 to expedite the arraignment of persons charged with crimes, other than capital, by permitting them to waive indictment proceedings. This act was recommended and explained in the Eighth Report (pp. 41–44) and in the Ninth Report (pp. 38–40). As to its operation, in a news report of a sitting of the grand jury for Hampden County in the *Springfield Republican* of December 17, 1935, appears the following paragraph:

> "The new law under which defendants bound over to the grand jury can waive consideration of their cases before that body, and have them disposed of at a session of Superior Court, prior to the time of sitting of the grand jury, has resulted in greatly expediting business before that body. It has tended to reduce the amount of business which the grand jury has to consider by a substantial amount, and for that reason this session of the body is expected to be brief".

Chap. 324 of 1934, relative to entry and other fees in the Probate Courts.

By Resolves, Chap. 40 of 1933, the Judicial Council was requested to report on various matters relating to fees including fees in the Registries of Probate. The report on these probate fees appears in the Ninth Report of the Council (pp. 57–61). Of the different plans which had been submitted to the legislature in regard to these fees, the plan of the Judicial Council explained in that report was adopted with some modifications by the statute referred to.

Chap. 387 of 1934, giving the District Courts exclusive jurisdiction of motor vehicle cases, and *Chap. 268*, relative to parking cases, were not recommendations of the Judicial Council, but mention of the general discussion of conditions which resulted in these bills appeared in the various reports of the Judicial Council relating to congestion and other excessive use of criminal process with its incidental stigma in dealing with municipal and other regulations, which have been known in Massachusetts as "prudential" regulations rather than as criminal laws.

Chap. 247 of 1935, procedure in the Probate Courts for interpretative judgments as to the meaning of written instruments.

This act was recommended in the Ninth Report (pp. 44–45) and in the Tenth Report (p. 38).

Chap. 358 of 1935, an act relative to probation and suspended sentences of persons sentenced to pay fines only.

This act was recommended in the Ninth Report (pp. 40–41) and in the Tenth Report (pp. 28–29).

Chap. 410 of 1935, exemption of wages, to the extent of twenty dollars for each week, from attachment.

This act was recommended in the Eighth Report (pp. 44–46), in the Ninth Report (p. 36), the Tenth Report (p. 39) and by Governor Curley in his inaugural address in 1935.

The rule of the Supreme Judicial Court revising the form of summons in actions at law (See Report of the Judicial Council reprinted in this number (p. 21).

The rule of the Supreme Judicial Court relative to practice by officials of District Courts in criminal cases (See Report of Judicial Council in this number (p. 16).

REFERENCES TO EARLIER REPORTS OF THE JUDICIAL COUNCIL IN THE MASSACHUSETTS LAW QUARTERLY.

Previous reports of the Judicial Council were reprinted in the QUARTERLY for November, 1925, December, 1926, November, 1927, December, 1928, December, 1929, November, 1930, November, 1931, November, 1932, November, 1933 and November, 1934. The Eleventh Report reprinted herein has been filed with the Governor. Copies of all the reports of the Council (which are numbered Public Document 144) are obtainable at the Public Document Room in the State House, Boston.

PRELIMINARY WELCOME TO THE AMERICAN BAR ASSOCIATION FOR THE MEETING IN BOSTON IN AUGUST, 1936.

A word of welcome is extended to the members of the bar from other states and countries who will come to Massachusetts next August to attend the annual meeting of the American Bar Association during the week of August 24th.

Plans for the meeting will be announced later.

"As the Critics See It—'The Real American will be about the Last Person in the World to Enjoy Excessively Centralized Government'. FEDERALISM—OR STATES' RIGHTS?"

Reproduced by permission from the New York Times, Magazine Section of December 15, 1935.

SUGGESTED OPTIONAL PROCEDURE FOR JURIES OF SIX IN THE SUPERIOR COURT.

The following proposal, which has been suggested to us for civil cases, is printed as, perhaps, worthy of consideration by the bar and by the legislature. This proposal, if deemed advisable, would not seem to require a constitutional amendment.

The constitutional right to jury trial is a personal right which may be waived or, perhaps more accurately, trial with or without jury is optional even in a criminal case (see *Com.* v. *Rowe,* 257 Mass. 172; MASSACHUSETTS LAW QUARTERLY for August, 1923, p. 7). The whole district court system has been based on waiver, either by failure to appeal, or failure to remove, or by starting a case in the district court. The jury-waived sessions of the Superior Court are based not only on express waivers but on waivers by failure to claim a jury trial under G. L. Chap. 231, Sec. 60, *Foster* v. *Morse,* 132 Mass. 354; *Peirson* v. *Boston El. Ry.,* 191 Mass. 223–230.

A constitutional jury in America consists of twelve men, if that number is insisted on, but the right to waive objection to trial by a number less than twelve is clearly established even on the criminal side of the court both in Massachusetts and in the United States Courts (See *Com.* v. *Daly,* 12 Cush. 82, and *Patten* v. *U. S.,* 281 U. S. 276). Such a trial by less than twelve by agreement of both parties to waive the larger number is, we understand, not uncommon in the Superior Court in Suffolk County, especially when the supply of jurors has run short and parties wish to get ahead with their case. The waiver of the full number does not change the character of the trial. It is still a constitutional jury trial.

The late Mr. Justice Bishop stated that he had not infrequently tried cases in this way with six or eight jurors. The legality of this practice of waiver of a full jury being thus established it seems to be within the legislative power of "reasonable regulation" with a view to more prompt and less expensive procedure, to provide that if a party wishes to have a trial by a full jury of twelve, he shall claim it specifically, and pay a jury fee of $15. or some reasonable sum, but that if he claims a jury but does not specify a trial by jury of twelve, he shall be deemed to have waived that number and may have a jury of six without payment of a jury fee.

One member of the bar to whom the foregoing discussion was submitted for comment wrote as follows:

> "It seems to me that you misunderstand the problem. Our constitution provides for a trial by jury, which is twelve men. It also provides for a trial by the court, which is a trial by a judge and litigants are entitled to choose between those two methods. The tribunal which you propose to set up is, of course, another optional method, which any one can have if he wants it. My proposition is that if he says a jury, he is entitled to twelve, and if he says a court, he is entitled to a judge. If the statutes permit, he perhaps can ask for a judge and six men; but when he asks for a jury, he is entitled to a constitutional jury, not something else. This goes to the correctness of your argument; not to the desirability of letting parties proceed with less than twelve."

Of course, if the matter were seriously considered by the legislature it would be advisable to ask for an advisory opinion of the justices as to the constitutionality of the plan. But we respectfully submit that the comment quoted above to the proposal is not convincing and that the plan is clearly constitutional in accordance with the principles recognized both by the Supreme Judicial Court of Massachusetts and the Supreme Court of the United States.

To begin with, it being established by the cases cited that a man may waive a jury either in a civil or a criminal case and thus substitute one man—the judge—to decide the facts instead of a jury of twelve men *and* a judge, and that this may be done without affecting the jurisdiction of the court in any particular, it is difficult to see any constitutional principle which would prevent the legislature from making a reasonable regulation under which a man should exercise his option between a jury of six and a judge and a jury of twelve and a judge in the same way that he now does between a jury and a judge alone. As long as the jurisdiction of the court is not affected and the right to jury trial is a purely personal right which may be waived, there seems to be no reasonable ground for saying that it can not be held to be waived in part by failure to specify the whole in his claim.

The suggestion that juries of six should be provided in the district courts seems inadvisable, not because it could not be accomplished by using the principle of waiver without a constitutional amendment, but because it would create in the district courts the same sort of congestion that has caused so much difficulty in the

Superior Court and would also add to the expense of juries in the Superior Court, the concurrent cost of juries, and all the incidental requirements, in 73 district courts. But the fact that juries of six have been frequently suggested as desirable and likely to satisfy many litigants, as an alternative to the judgment of one man, indicates that it is a reasonable plan within the constitutional power of the legislature to adopt reasonable practical regulations providing for waiver of part of a jury while retaining the option of a full jury.

As a basis for discussion, the following draft is submitted.

F. W. G.

DRAFT ACT.

Section 1. Section sixty of chapter two hundred thirty-one of the General Laws (Ter. Ed.) is hereby amended by adding at the end thereof the following sentence:

> The list of cases to be tried by juries shall be kept in two parts—one list of cases in which a trial by a jury of twelve is claimed as hereinafter provided for, and the other list of cases in which a trial by a jury of six is claimed as hereinafter provided. Unless a party who claims a jury trial specifies in his claim that he wishes a trial by a jury of twelve and pays to the clerk at the time of filing such claim to the use of the county a jury fee of fifteen dollars, he shall be deemed to have waived his right to a jury of twelve and to have claimed a jury of six.
>
> The court may in its discretion upon motion for cause shown, notwithstanding any such waiver, permit the trial of any case or of any part thereof or issue therein by a jury of twelve with or without payment of such jury fee.

Section 2. The foregoing section shall take effect on the day of in the current year and shall apply to all cases not theretofore entered in said courts.

As to cases theretofore entered including cases in which a trial by jury has been claimed, a party may within twenty-one days after said day of file a claim for trial by twelve jurors and pay to the clerk to the use of the county a jury fee of fifteen dollars. If such claim is not made and the fee paid as aforesaid, he shall be deemed to have waived trial by twelve and to agree to trial by a jury of six. The same discretionary power provided in the foregoing section shall apply also to such pending cases.

ATTORNEY'S FEES AND LIENS AND PROCEDURE RELATING TO THEM, WITH A PROPOSED ACT.*

It is doubtful whether in Massachusetts today an attorney's lien exists beyond such as is provided by a statute (Ch. 221, Sec. 50) covering the mere taxable costs of a suit; nor is there any speedy remedy whereby an attorney or client can seek a determination of the reasonableness of legal charges and expense incurred in litigation. The lack of a reasonable provision for security for such fees and expenses often leads to situations inimical to the interests of both attorney and client. This often results in costly delays to clients in procuring the fruits of their causes; attorneys seldom feel secure in their employment or remuneration, and "chisellers" can, with impunity, procure the unreasonable discharge of an attorney on the assurance to an irresponsible client that counsel need not be paid for services already rendered. This "Damocles Sword" prompts lawyers to accede to inadequate settlements, lest lapse of time lose to them their fees. On the other hand unreasonable charges by attorneys are the subject of constant complaint—clients are relegated to law suits which can be drawn out at the attorney's pleasure.

In nearly every other state legislation has remedied this situation, while Massachusetts has failed to keep step with the times, to the general dissatisfaction of both the public and the legal profession. This situation has given rise to judicial decisions and legislation creating and enforcing an attorney's lien, and the following discussion of such legislation and decisions provides both moral and legal reasons for the proposed legislation appended hereto.

Lien of Attorney.

Justification for the Lien.

It is based on the natural equity that the plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment. *Meidreich* vs. *Rank*, 40 Ind. A. 393, 82 N. E. 117.

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* This study of the subject is printed for the information of the bar in view of the recent discussions before the legislature. Neither the Massachusetts Bar Association nor the Publication Committee have acted on the proposed act or the views expressed. Ed.

ORIGIN.

Attorneys' liens are of early origin and have been referred to as far back as 1 Douglas 238 in the case of *Welsh* vs. *Hole* wherein Lord Mansfield said:

"If the attorney gives notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong and like paying a debt which has been assigned after notice", and at pages 101, 104 in the same report, in the case of Wilkins vs. Carmichael he said, "the practice . . . was established on the general principles of justice, and that courts both of law and of equity have now carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed until his bill is paid".

"It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained". *Goodrich* vs. *McDonald*, 112 N. Y. 157, 163.

NATURE AND DEFINITION.

An attorney's lien is of two kinds:—thus, the *Retaining* or *Possessory Lien*, and the *Special* or *Charging Lien*.

The two liens, their nature, extent and distinguishing characteristics are pointed out in the cases; thus in *Weed Sewing Machine* vs. *Boutelle*, 56 Vt. 570, the court said: "The failure to distinguish between the two has led to an apparent, though not real, conflict and confusion in the decisions on this subject. By a retaining lien an attorney has the right to retain money or documents,—such as deeds, notes and other papers,—which come into his hands professionally for collection, or other professional action, for the payment of whatever is due him for professional services, whether bestowed on the particular thing retained or otherwise". Thus the lien may be maintained for the general balance due the lawyer from the client, as well as for services bestowed on matters concerning the res retained.

Speaking of a *Charging Lien*, Morgan J., in *Adams* vs. *Fox*, 40 Barber (N. Y.) 422, said: "This lien is totally different from the lien upon the papers. The lien on the judgment is confined to the particular suit, and the attorney can actively enforce it. The lien on the papers is merely a right to retain them, and applies to all his bills for costs." It is to be noted however and the later discussion indicates that the charging lien has been materially enlarged by statute and decision in the several states and now extends, in most jurisdictions, to counsel fees as well as taxable costs of the suit.

The Retaining Lien.

Universality.

The retaining lien is a well established common law right and is almost universally recognized,[1] but there is a doubt as to whether it exists in Massachusetts apart from the lien given by statute on an execution. In *Baker* vs. *Cook*, 11 Mass. 236, the court said that at common law an attorney has no lien upon a judgment for his fees and disbursements, but that he is given one by statute and that he still has a lien therefor on money he has collected on the judgment. The reporter, Tyng, in a note to *Baker* vs. *Cook* says that an attorney has a lien on money and proceeds of judgment "as well as on papers and documents", inferring thereby that the result would be the same at common law. However he cites only English cases and textbooks, and adds "the lien is general for fees, expenses and costs".

In *White* vs. *Harlow*, 5 Gray 463 in 1855, the court said:

"How far the law, giving an attorney a lien upon the papers of his clients in his hands for fees and disbursements, has been adopted in this commonwealth is doubtless an open question. The statutes give him a lien upon the execution. Rev. Sts. Ch. 88, Sec. 28; Ch. 97, Sec. 76. The statute of 1810 Ch. 84, seemed to recognize the existence of such lien upon the judgment. See also *Getchell* vs. *Clarke*, 5 Mass. 309; *Baker* vs. *Cook*, 11 Mass. 236; *Dunklee* vs. *Locke*, 13 Mass. 525; *Woods* vs. *Verry*, 4 Gray 357. We have not felt it necessary to decide the general question; for supposing the rule of the common law to be in force in this state, we think the facts, as reported, did not bring the witness within it".

Again in *Simmons* vs. *Almy*, 103 Mass. 33, 35 in 1869 the court said, "The law which gives an attorney a lien, in some cases, upon the papers of his client in his hands, for fees and disbursements *if recognized as prevailing in this Commonwealth*, has no application here."

In *Soper* vs. *Manning*, 147 Mass. 126, 130, an attorney retained a draft, demanding payment of his fee as a condition of turning it over to his client. The client sought possession of the draft and damages for its retention, in a suit in equity. The court determined the amount and validity of the attorney's claim for fees, ordered them paid from a fund previously deposited in court by the plaintiff, and ordered the return of the draft by the attorney to his client. As to damage for retention of the draft, the court said, "There is, however, no good ground for this in view of the fact that the plaintiffs originally denied to him any right to the compensation under his contract to which the master has found him entitled." Although no mention is made in this case of the term "lien" the question arises whether the court's decision was based on this principle without discussing it, or on general equitable grounds.

[1] *Tedrick* vs. *Hiner*, 61 Ill. 189. *Sanders* vs. *Seelye*, 128 Ill. 631, 637.

In *Newell* vs. *West*, 149 Mass. 520 in 1889, the court seems to recognize the retaining lien on money, at least, as a right to set-off, but it is only *obiter dictum*. In *Blake* vs. *Corcoran*, 211 Mass. 406, the court recognized the rule that a lawyer might set off his claim for services and counsel fees, as distinguished from attorneys' fees under the statute, against money collected by him on an execution in favor of his client. The court said that he had no lien for counsel fees, but merely a right to a set-off. Obviously this case is no authority for a retaining lien on papers and documents.

Thus, it seems to be doubtful whether an attorney has a *retaining* lien in this Commonwealth. But see G. L. (Ter. Ed.) Ch. 255, Sec. 32, referring to attorney's liens. Query whether the court might not decide that this section is a "legislative declaration" that a retaining lien exists? Compare the situation in *Dunklee* vs. *Locke, supra*. It seems wise, therefore, if any new legislation is drawn, to give the bar such a lien in this Commonwealth, and thereby give it the same rights which lawyers have in other states and in England.

TO WHAT THE LIEN ATTACHES.

The lien includes money collected by the attorney and also notes, bonds, and ordinary legal documents delivered to him by his client in the course of and with reference to his professional employment. It is immaterial that no suit was commenced,[2] or that the fees or costs arise from matters not related to the *res* of the lien; but the attorney cannot claim a lien on public records or on a will.[3] It should also be noted that where property is intrusted to the attorney for a special purpose inconsistent with a claim of lien, no lien exists.[4] However, if the property remains in his hands after the end of the transaction, he may then claim a lien.

RIGHT TO POSSESSION OF RES.

The attorney claiming the lien need not surrender the papers to anyone or allow anyone to inspect them, but the court may, if the papers are needed in a suit, order him to surrender the papers for that purpose.[5]

ASSIGNABILITY.

The retaining lien is not assignable, and an attempted assignment of the attorney's rights or part of them defeats the lien.[6]

PRIORITIES.

A. Creditors.

The lien is superior to the rights of the client's creditors even where the creditor trustees the money in the attorney's hands,[7] and the lien relates back and takes effect from the beginning of the

[2] *Mathot* vs. *Triebel*, 98 App. Div. 328.
[3] *Wright* vs. *Cobleigh*, 21 N. H. 339.
[4] *Anderson* vs. *Bosworth*, 15 R. I. 443. See also *Newell* vs. *West*, supra.
[5] *Penn. Finance Co.* vs. *Charleston R. Co.*, 52 F. 526.
[6] *Lovett* vs. *Brown*, 40 N. H. 511.
[7] *Weed Sewing Mach.* vs. *Boutelle*, ubi supra; *Hargett* vs. *McCadden*, 107 Ga. 773.

services, and is not affected by the claims of creditors attaching to the clients' interest in the property involved in the matter after the beginning of the services.[8]

B. Assignees.

The lien is even superior to the rights of an assignee of the clients' rights who took without notice and for value,[9] but it extends only to the rights of the client in the *res* of the lien as of the time of the perfection of the lien.[10]

SETTLEMENT.

A different rule exists in Massachusetts as to settlement. Thus, it is held that where the client settles the matter before judgment or decree without the knowledge and consent of the lawyer, the latter has no lien on the proceeds of the settlement.[11] In many states, however, the lawyer is protected by statutes giving him a lien on the cause of action. By virtue of these statutes the lawyer has a lien on the proceeds of the settlement, although he cannot prevent the settlement. The defendant pays over the money at his own risk. For cases discussing and quoting such statutes see *Proctor Coal Co.* vs. *Tye,* 123 Ky. 381, 386; *Kems* vs. *Wash. Water Co.,* 24 Ida. 525; *Matter of Salant,* 158 App. Div. (N. Y.) 697; *Stanley* vs. *Bouch,* 107 Wis. 225. Even in the absence of such statutes some courts have withheld sanction of a settlement made without the plaintiff's attorney,[12] and in Massachusetts see note to *Getchell* vs. *Clark,* supra, on the question of whether on a collusive settlement the defendant is liable to the attorney for the plaintiff for the amount to which the attorney is entitled for fees.

It is generally held that after judgment no action of the client whether by settlement or otherwise can defeat the attorney's lien after it has been perfected by notice or otherwise. In re *Adamo,* 151 F. 716; *Bickford* vs. *Ellis,* 50 Me. 121. In Massachusetts, the statutory lien of an attorney on an execution referred to cannot be defeated by a release given by the client to the debtor.[13]

THE CHARGING OR SPECIAL LIEN.

At common law this lien is the attorney's right to recover his taxable costs from a fund recovered by the attorney's aid and also to have the court interfere to prevent or set aside assignments or settlements made in fraud of his right. It did not usually attach

[8] *Lawrence* vs. *U. S.,* 71 F. 228. See also *Thayer* vs. *Daniels,* 113 Mass. 129.

[9] *Bruce* vs. *Anderson,* 176 Mass. 161; *Guliano* vs. *Whitenack,* 30 N. Y. S. 415; *Matter of Heinsheimer,* 159 App. Div. 33.

[10] *Penn. Finance Co.* vs. *Charleston R. Co.,* supra; *Weed Sewing Mach. Co.* vs. *Boutelle,* supra.

[11] *Herbits* vs. *Constitution Indemnity Co.,* Mass. 1932 Adv. Sh. 1097, 181 N. E. 723; *Check* vs. *Kaplan,* 1932 Mass. Adv. Sh. 1455, 182 N. E. 305; *Simmons* vs. *Almy,* supra; *Getchell* vs. *Clark,* supra. See also notes in 11 L. R. A. 711 and 40 L. R. A. (N. S.) 593.

[12] *Young* vs. *Dearborn,* 27 N. H. 324; *Pleasants* vs. *Kortrecht,* 5 Heisk (Tenn.) 694, 696.

[13] *Bruce* vs. *Anderson,* supra.

until the recovery of judgment, and then did not prevent an honest settlement, nor a payment to his client until the attorney has notified the debtor of his intention to claim a lien on the judgment which must be in the attorney's possession.[14] The decisions in this country speak of it as an *equitable* lien, right or privilege, and where the *res* is not in the possession of the lienor it seems that the attorney must seek relief in equity.[15] As pointed out heretofore the lien was extended by the early English cases and now "the lien does not in any way depend upon possession, but rests on the equity of the attorney's claim, to be repaid out of the judgment, for his fees and disbursements, which ordinarily constitute part of the judgment itself".[16] Now it exists in this sense in most states either by statute or judicial decision. Thus in Massachusetts see G. L. (Ter. Ed.) Ch. 221, Sec. 50; *Thayer* vs. *Daniels,* 113 Mass. 129; *Baker* vs. *Cook,* 11 Mass. 236.

CONSTITUTIONALITY OF STATUTES.

These liens have generally been held constitutional except where, as in New York, a statute restricted the freedom of contract. So an act providing that "no settlement of an action for personal injuries wherein an attorney claiming a lien has appeared for the claimant shall be valid unless consented to in writing by such attorney or approved by the court", was held unconstitutional.[17] Other cases have held that the statutes creating such liens are to be construed liberally in favor of the attorney in that they are remedial in character and aid should be given to encompass the object sought by the legislature.[18] The statutes are not retroactive unless they so specifically state.[19]

LIEN MAY BE CREATED BY AGREEMENT.

An agreement that the attorney is to be paid out of the judgment recovered, in some states, operates as an equitable assignment of the fund pro tanto and creates a lien if that was the intention of the parties. See *Barnes* vs. *Alexander,* 232 U. S. 117, 121. In *Delval* vs. *Gagnon,* 213 Mass. 203, it was held that a right in the nature of a lien enforceable in equity was created in favor of the attorney, where after verdict and before judgment in a conversion case, the client agreed with the attorney that the proceeds of the judgment about to be entered on the verdict should be taken by the attorney for fees in that and other litigation, with the intention of giving the attorney a charge on the specific fund as security for the sum due him, there being no intimation that the agreement was

[14] *Weed Sewing Mach.* vs. *Boutelle,* 56 Vt. 570, 578; 37 Eng. L. & Eq. 470.

[15] *Fillemore* vs. *Wells,* 10 Colo. 228, 236.

[16] *Wright* vs. *Cobleigh,* 21 N. H. 339, 341.

[17] *N. Y. Judiciary Law,* Sec. 480; *Strahlendorf* vs. *Long Island R. Co.,* 162 App. Div. 358.

[18] *Fischer-Hansen* vs. *Brooklyn Hts. R. Co.,* 173 N. Y. 492; *Wait* vs. *Atchinson R. Co.,* 204 Mo. 491.

[19] *Baker* vs. *Baker,* 258 Ill. 418, 421.

made in bad faith. The lien is such as to take priority over a creditor who sought to reach and apply the proceeds of the judgment.[20] The charging lien is confined strictly to fees and costs due for services in the particular suit in which the judgment is rendered. But this has been extended by statute in some states to extend for services rendered in other cases as well,[21] and it can also be extended by agreement as in *Cooke* vs. *Thresher,* 51 Conn. 105.

WHAT FEES COVERED BY LIEN.

Under the English practise an attorney's lien on a judgment was confined to fees and costs taxable therein but this covered the fees of counsel or barrister, because they have no direct relation with the client, but get their fees from the attorneys or solicitors who collect from the client. Except in Massachusetts and Rhode Island the practise of taxing attorneys' fees as costs has generally been abolished and by statute and judicial decision the lien in question has been extended to cover fees due to an attorney by contract or under a *quantum meruit* (6 C. J. 771).

In Massachusetts today, the lien exists only for fees allowed in the bill of costs. G. L. Ch. 221, Sec. 50 (Ter. Ed.). Thus distinguishing attorneys' fees from counsels' fees. *Turner* vs. *Woodard,* 259 F. 737—and the lien does not exist for general counsel fees.[22] The evolution of the rule that the lien extends only to attorneys' fees taxable as costs is very unsatisfactory from a legal and logical point of view and it will be noted that nowhere in the decisions is any reason given for this construction—not even an historical reason. In Massachusetts at common law an attorney has no lien on the cause for his fees or disbursements, either before or after judgment.

In *Getchell* vs. *Clark,* 5 Mass. 309 (decided 1809) there was a finding in favor of the plaintiff by a referee's report. Thereafter and before judgment the parties settled the dispute and the plaintiff gave the defendant a release. Then the plaintiff's attorney moved that the report be accepted and judgment entered on it to secure his fees. The court denied the motion because "before judgment, it was very clear that the plaintiff might settle the action, and discharge the defendant, with or without the consent of his attorney, who had no lien on the cause for his fees; that after judgment, if the plaintiff released the judgment to the defendant, the law had provided no remedy for him, but an action against his client". Shortly thereafter St. 1810, Ch. 84, impliedly gave him a lien upon the judgment and execution for his "fees and disbursements". This statute concerned the setting off of one execution against another and provided that this could be done but same shall not affect the lien "which any attorney *may* have for his fees".

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[20] See also *Boyle* vs. *Boyle,* 116 Fed. 764; *Newell* vs. *West,* 149 Mass. 520.
[21] *Fillemore* vs. *Wells,* 10 Colo. 228; *Cheshire* vs. *Des Moines R. Co.,* 153 Ia. 88.
[22] In re *Redmond & Co.,* 17 F. (2nd) 501.

In *Baker* vs. *Cook,* 11 Mass. 236 (1814), the court referred to the lien as one for "fees and disbursements" and held that "at common law an attorney has no lien on a judgment—for his fees or disbursements. But the statute certainly gives one. The (attorney) thus had a lien on the plaintiff's judgment—for his fees and necessary disbursements". Held also that counter executions could not be so set off as to defeat an attorney's lien. Note that nothing in this case limits the lien for attorneys' fees to those taxable as costs. The court in *Dunklee* vs. *Locke,* 13 Mass. 525, said that the statute referred to "amounts to a legislative declaration that such a lien exists, and it must be recognized". Our present statute, Ch. 221, Sec. 50, of course sets out such a lien in clear language.

These earlier cases in this jurisdiction merely referred to the lien as one for "fees and disbursements" but in 1839, in the case of *Ocean Insurance Co.* vs. *William Rider,* 22 Pick. 210, the precise question concerning what fees were covered by the lien was in issue. The argument of counsel is worth referring to as it points out that in the previously decided cases the "fees and disbursements" referred to in the statute were in no way restricted. The attorney argued that "In England the attorney has a lien for the fees *paid by him to the barrister,* and that the word "attorney" is used by the legislature for attorney and counsel, and the intention is to protect . . . all that is reasonably charged and expended by the person prosecuting the suit for the party, and not merely the taxable costs". See cases cited. The court however, without assigning reasons, said "We think the statute does not refer to counsel fees, but only to taxable costs . . . this view of the question, we believe, is in conformity to the practice".

FEES AS TAXABLE COSTS.

The case of *Fuller* vs. *Trustees of Deerfield Academy,* 252 Mass. 258, contains as good a discussion of this question as can be found in the state. In this case a motion to amend a bill in equity was allowed on condition that the plaintiff pay a certain amount to attorneys for the defendant as fees for services rendered in the litigation for the benefit of the clients whom they represented. The sum involved was imposed as terms and not as taxable costs, but the court discussed the latter question in full detail and Chief Justice Rugg says, "A nominal counsel fee is allowed as an item of taxable costs in civil causes. G. L. Ch. 261, Sec. 23. Ordinarily, no other attorney's fee is allowed . . . taxable costs are in contemplation of law full indemnity for expenses of a party who is successful in a suit between party and party whether at law or in equity. *Newton Rubber Works* vs. *DeLas Casas,* 182 Mass. 436; *Rowland* vs. *Maddock,* 183 Mass. 360 at 365; *McIntire* vs. *Mower,* 204 Mass. 233 at 237. It cannot be thought that the power to impose terms as a condition of allowing an amendment of pleadings

conferred in G. L. Ch. 231, Sec. 5, authorizes the imposition of terms in excess of what could under any circumstances be "included in taxable costs". The chief justice points out, however (at p. 262), that in numerous instances the power in the courts to award counsel fees in excess of those included in taxable costs has been made the subject of statutory regulation as in "The power to award counsel fees in contested will cases, G. L. Ch. 215, Sec. 45, and cases cited; counsel fees in divorce and separate maintenance proceeding, G. L. Ch. 208, Sec. 17, Ch. 209, Sec. 33, and cases cited; in trustee process counsel fees to trustee G. L. Ch. 246, Sec. 68 and cases cited; counsel of a guardian ad litem, G. L. Ch. 240, Sec. 9". "Even the words 'costs and expenses' in a statute have sometimes been held not broad enough to include counsel fees". See extensive review of cases by Hammond J. in *Sears* vs. *Nahant*, 215 Mass. 234. And in *Blake* vs. *Corcoran*, 211 Mass. 406, the court, citing the three early cases before mentioned, as authority, stated that the attorney had no lien for counsel fees. (*Getchell* vs. *Clark*, *Baker* vs. *Cook*, *Ocean Ins.* vs. *Rider*.) The court gives no further reasons for this rule but takes it for granted that this is the law.

There would thus seem to be ample precedent for providing by statute that the amount of counsel fees properly to be awarded be determined, at least, by the court having jurisdiction of the cause and it is but a short step to follow the rule obtaining in other jurisdictions giving such power to courts other than those in which the original cause was determined.[23] The application of the English rule to practice in this country would seem to be unsound, inasmuch as it is based on the difference between the attorneys or solicitors and barristers in England. The distinction between English and American practise which militates against such restriction of the lien is best expressed by the court in the case of *Friselle* vs. *Haile*, 18 Mo. 18, 20, where it is said:

> **"Attorneys and counsellors at law in Missouri are not to be confounded with the mere attorney and solicitor in England. These last are recognized officers of the court, and are entitled to fees for the services performed by them in the same manner as the clerks of our courts of record. . . . Attorneys at law, in our courts . . . look to contracts made with their clients for remuneration for services rendered. If they receive the money of those who employ them, they may retain their fees, just as any other bailee may retain, for services rendered in its care, the subject of the bailment. Hence the learning in the English books in relation to the liens of attorneys, has no application, or an extremely limited one, under our system of laws".**

It seems also that an attorney should be entitled to a lien for any legitimate expense incurred by him in the prosecution of an action and should not be limited to the taxable items of costs and disbursements. The decisions in other states are typified by the statement in *McDougall* vs. *Hazelton Tripod-Boiler Co.*, 88 F. 217, 225, where it is said, "the labor and money expended are equally

[23] See *Ill. Rev. Stat., 1921, Ch. 13, Sec. 14.*

the property of the lawyer, and alike necessary to the prosecution of the suit. In substance they are intrinsically connected—the service and the expenses incurred in rendering it".

NOTICE.

In some states actual notice of the lien is sufficient even though a statute required the notice to be filed with the clerk or an entry to be made on the judgment book. The court in *Porter* vs. *Hanson*, 36 Ark. 591, 604, says "The object of the statute was to protect those who in good faith and without notice make payment on the judgment". The rule varies in different states. In Maine, knowledge that an attorney has been employed in the suit is sufficient notice of his lien, *Gammon* vs. *Chandler*, 30 Me. 152. In Minnesota by Rev. L. 1905, Sec. 2288, subdivision 3, an attorney has a lien on the cause of action of his client from the time of the service of the summons. No other notice is necessary. As to notice to an assignee of the client, see *Heartt* vs. *Chipman*, 2 Aiken (Vt.) 162, where the court says "it is more reasonable to require the assignee, who takes the demand subject to the same equity, and in no better condition than it was in the assignor's hands, and who knows, or is presumed to know, the law as to the attorney's lien, to make the necessary inquiry before he takes the assignment, and notice to him from the attorney, which must frequently be impracticable, is not necessary."

In Iowa the court, in *Smith* vs. *Chicago R. Co.*, 56 Ia. 720, held that under the statutory provision there obtaining, notice of a lien given at the institution of a suit is effective to entitle the attorney to a lien against the defendant in the suit for any amount which may become due to the attorney from his client for his professional services, and the adverse party in making settlement with the client without consulting his attorney becomes liable for the amount of the attorney's fees actually due. See *Iowa Code Sec. 321*—under which a single notice that a lien is claimed is sufficient to cover all services rendered and to be rendered whether before or after service of the notice. *Smith* vs. *Chicago R. Co.*, supra.

LIEN ON CAUSE OF ACTION.

By statute in some jurisdictions, an attorney has a lien upon his clients cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof.[24] The effect of such a provision as to an attorney for the plaintiff is

(*a*) he has a lien from the commencement of the action, upon his client's cause of action or claim;

(*b*) such lien attaches to the verdict, report, decision, judgment, or final order in his client's favor;

[24] *New York Code Civ. Proc.*, Sec. 66—*Matter of Albers Realty Co.*, 140 App. Div. 277. 6 C. J. 778.

(*c*) being conferred upon the cause of action, it is not lost by a settlement of such cause of action;

(*d*) it attaches to the proceeds of such action, although the action never reaches a verdict, etc.

The states which provide attorney's liens for fees universally hold that a client cannot, by discharging an attorney, deprive him of his lien, unless the discharge is for good cause.

ACTIONS EX DELICTO.

Where the statute provides for an attorney's lien, without specifically confining it to causes of action arising *ex contractu*, it seems that the lien exists upon a cause of action arising *ex delictu* and for unliquidated damages, as well as in other cases.[25] In many states, an attorney is given by statute a lien upon his client's cause of action which attaches to the proceeds of a judgment in whosesoever hands they may come.[26] The lien extends to whatever form the client's cause of action may assume and enables the attorney to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment. Thus any property right which the judgment protected, secured or enforced may be called the proceeds of the judgment and is subject to the lien.[27]

ENFORCEMENT.

An attorney may apply to the court to establish his lien on the theory that until a judgment is fully executed, the court retains jurisdiction of the subject matter and the parties for the purpose of hearing any motion affecting such judgment.[28] A dispute as to the amount of the fees does not prevent an independent action by summary process to enforce this lien, but it seems that a motion is all that is necessary.[29]

The attorney may intervene in the original case to secure his lien.[30] In such cases both plaintiff and defendant should be joined in the petition and they should have opportunity to file answers and join issue as in any other case. The court, on application of the attorney, may issue an order restraining the judgment debtor from paying the money to the plaintiff until the attorney's lien is satisfied.[31]

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[25] *Miller* vs. *Houston*, 27 Colo. A. 89; *Standidge* vs. *Chicago R. Co.*, 254 Ill. 524; *Astrand* vs. *Brooklyn Hts. R. Co.*, 53 N. Y. S. 294. But see *Wood* vs. *Andres*, 5 Bush. (Ky.) 681, where a similar statute was held not applicable to torts. 6 C. J. 779.

[26] *N. Y. Code Civ. Proc.*, Sec. 66; *Texas* vs. *White*, 10 Wall. (U. S. 483). See *Iowa Code*, Sec. 321, giving attorney a lien on the money due from the adverse party. *Gibson* vs. *Chicago R. Co.*, 122 Iowa 565.

[27] *Matter of Jones*, 136 N. Y. S. 819.

[28] *Dahlstrom* vs. *Featherstone*, 18 Ida. 179; *Gist* vs. *Hanley*, 33 Ark. 233; *Fillemore* vs. *Wells*, 10 Colo. 228; *Radley* vs. *Gaylor*, 98 App. Div. (N. Y.) 158; *Adams* vs. *Fox*, 40 Barb. (N. Y.) 442.

[29] *Commercial Tel. Co.* vs. *Smith*, 10 N. Y. S. 433; *Goodrich* vs. *McDonald*, 112 N. Y. 157; *Brown* vs. *Bigley*, 3 Tenn. Ch. 618.

[30] *Patrick* vs. *Leach*, 17 Fed. 476; *Weicher* vs. *Cargill*, 86 Minn. 271.

[31] *Collins* vs. *Hathaway*, 6 F. Case, No. 3,014; *Young* vs. *Dearborn*, 27 N. Y. 324; *Creighton* vs. *Ingersoll*, 20 Barb. 541.

In New York an attorney with client's money in his possession has a right to a summary hearing by the court to establish the existence and amount of his lien by petition or motion.[32] In *Loaners Bank* vs. *Nostrand,* 53 N. Y. super. 525, a sheriff was stayed from paying the proceeds of an execution sale to the plaintiff's assignee, until the amount of the attorney's fees could be ascertained.

In some states an attorney's lien upon real property is enforced as is a foreclosure of a mortgage.[33]

It has been held in many jurisdictions including Massachusetts that since an attorney is regarded as having an equitable assignment of a judgment to the extent of his lien, he can proceed in the name of his client, to collect the judgment to the extent of his lien.[34] In *Woods* vs. *Verry,* 14 Mete. 357, Shaw C. J. held an attorney lawfully possessed of an execution in favor of his client, may enforce his statutory lien thereon for fees and expenses by an action on the judgment in the name of the client, for "when a party has by law a lien on a chose in action, as he cannot have a manual possession, actual or constructive, which is necessary to secure a lien on a chattel, the law gives him the necessary means of making good his lien and that is, in cases like the present, an action in the name of the judgment creditor which the debtor cannot defeat".

The lien extends to all provisional remedies and securities given after the commencement of the action. Thus to bail bonds, appeal bonds, replevin bonds, and even to arrest of a debtor. Thus in *Crouch* vs. *Hoyt,* 30 N. Y. S. 406, the court refused to allow the debtor to be discharged from arrest even though the plaintiff was agreeable, against the objection of the attorney whose lien for fees had not been paid. Some jurisdictions have given the attorney the right to maintain an appeal from a decision against his client, so that he may try for a more favorable decision and thus have a chance to enforce his lien.[35] This is true in most instances where there is fraud on part of his client in permitting a decision unfavorable to himself, in order to defeat the attorney's lien.

Some jurisdictions permit the attorney to enforce the lien by an original suit in his own name, in equity. In *Brown* vs. *Morgan,* 163 Fed. 395, 399, the court said: "If the attorney is to be regarded either as the equitable assignee of the judgment to the extent of the amount of his unpaid compensation for recovering the same, or as the equitable owner to the extent of his lien—in either

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[32] *Judiciary Law,* Sec. 475 (Consol. L. 1909, Ch. 30). In re King 168, N. Y. 53; *Corbit* vs. *Watson,* 85 N. Y. S. 125, where the amount of the lien is disputed on a summary hearing, the court in these jurisdictions may refer this point to a referee for determination and at such hearing all facts are considered, such as agreement for fees, *quantum meruit,* if no agreement, etc.

[33] See *Moss* vs. *Strickland,* 138 Ga. 539. See 6 C. J. 795.

[34] *Gammon* vs. *Chandler,* 30 Me. 152; *Tarver* vs. *Tarver,* 53 Ga. 43; *Newbert* vs. *Cunningham,* 50 Me. 231; *Smoot* vs. *Shy,* 159 Mo. A 126; *Steward* vs. *Biddlecum,* 2 N. Y. 103.

[35] *Counsman* vs. *Woodman of Amer.,* 69 Nebr. 710, 715. See also 6 C. J. 796.

case the judgment creditor is a trustee of the attorney to that extent, and equity is the proper forum in which to enforce the lien."[36]

The courts have gone so far as to permit an attorney to continue a suit already commenced, for the purpose of ascertaining and enforcing his lien in the situation where the client has settled and the result would otherwise be to deprive the attorney of his fees and costs. "It was a device of the courts and not of the legislature, and sprang from the necessity of providing some remedy against fraudulent settlements."[37] It is necessary in such case to move to vacate a satisfaction if it is on the records—the suit is then continued in the client's name, on the merits and the attorney must establish client's right to recover.[38] This cannot be done in divorce courts however.[39]

A statute can give the attorney the right to establish his lien at law rather than in equity. *Standidge* vs. *Chicago R. Co.*, 254 Ill. 524.

By statute an attorney's lien may be determined and enforced by the court on the petition of either the attorney or the client. *N. Y. Code Civ. Proc. Sec. 66, Judiciary Law Sec. 475.*

An attorney may proceed against both client and adverse party to enforce his lien and he need not first exhaust his remedy against his client. *Oishei* vs. *Met. St. R. Co.*, 97 N. Y. S. 447.

All persons interested are necessary and proper parties to the action by the attorney to enforce his lien. *Coomb* vs. *Knox*, 28 Mont. 202.

The judgment for the lien usually runs against the client and an alternative judgment against the other defendant that he pay if the account is not collectible from the client. *Dolliver* vs. *Am. Swan Boat Co.*, 65 N. Y. S. 978, as to dissolution of liens generally. See G. L. Ch. 255, Sec. 32, *et seq.*

Retaining Liens at common law cannot be actively enforced—it is the mere right to retain the papers and is valuable to the attorney only to the extent that such retention will embarrass the client. Thus he cannot, of course, sell the papers. *Thompson* vs. *Findlater*, 156 S. W. (Tex.) 301. But if the client applies to the court to compel the attorney to turn over the papers, or in a suit by the attorney to recover compensation, the court may ascertain the extent of the lien and enforce it. *Soper* vs. *Manning*, 147 Mass. 126; *Lesznyky* vs. *Merritt*, 9 Fed. 688. 6 C. J. 803.

Discussion of the Proposed Act for Massachusetts Submitted Herewith.

In the appended draft act provision is made for a summary hearing to determine the extent and validity of attorneys' liens.

[36] *Meighhan* vs. *Amer. Grass Twine Co.*, 154 Fed. 346, and cases of *Davidson* vs. *LaPlata County*, 26 Colo. 549; *Koons* vs. *Beach*, 147 Ind. 137; *Martin* vs. *Harrington*, 57 Miss. 208; *Fischer-Hansen* vs. *Brooklyn Hts. R. Co.*, 173 N. Y. 492; *Heartt* vs. *Chipman*, 2 Aik (Vt.) 162.

[37] *Fischer-Hansen* vs. *Brooklyn Hts. Ry. Co.*, 173 N. Y. 492, 499.

[38] *Twiggs* vs. *Chambers*, 56 Ga. 279; *Pickard* vs. *Yencer*, 21 Hun. (N. Y.) 403.

[39] *Chastain* vs. *Lumpkin*, 134 Ga. 219.

By this provision it is sought to remedy to some extent the evils mentioned in the introduction to this discussion by eliminating costly and long drawn out proceedings in determining the rights of attorney and client. The court in the case of *Long* vs. *Charles George*, 1935 Mass. A. S. 959, 961, in discussing a hearing under the provision of General Laws providing a method for discharge of attachments discussed the summary hearing in detail.

"The order discharging the attachment did not fail to be conclusive on the parties thereto because a decision after only a 'summary hearing'. That proceedings (for discharging attachments) are characterized as 'summary' does not necessarily prevent decisions therein being conclusive adjudications with respect to matters within the scope of the proceedings. Compare G. L. (Ter. Ed.) Ch. 239. *Edwards* vs. *Columbia Amusement Co.*, 215 Mass. 125. The reasons for holding decisions in summary proceedings not conclusive upon the same parties in other cases are that such proceedings do not permit full hearings on the merits and are not reviewable by an appellate court. See *Freeman on Judgments* (5th Ed.) Sec. 667–668, 843–845. See also *McCarthy* vs. *William H. Wood Lumber Co.*, 219 Mass. 566, 569. These reasons are not applicable (here). Nothing in the statute—or in the nature of the proceedings authorized thereby precludes full hearings on the merits of the questions involved. . . . A speedy or summary hearing does not imply an inadequate hearing.

Compare G. L. (Ter. Ed.) C. 248, Secs. 4, 15.

. . . Nor does the absence of a provision for a jury trial indicate that a full hearing is not contemplated. . . . the plaintiff in an action in which an attachment is made is not entitled to such a trial (jury) on the issue of his right to an attachment lien, even if the ownership of the property attached is thereby drawn in question (*Shea* vs. *Peters*, 230 Mass. 197, 200, 201, see *Stockbridge* vs. *Mixer*, 215 Mass. 415, 418)".

Relative to that paragraph in the proposed legislation providing for abatement of the action in the district court in the event of suit being brought in the equity court, *Mutual Life Insurance Co. of New York* vs. *Theresa J. Royal*, 1935 A. S. 1943 at 1944 is cited. This was an action at law wherein the defendant filed an answer in abatement setting up the pendency of a suit in equity. The answer in abatement was overruled, but the language of the court indicates that provision for abatement in the situation mentioned in the proposed legislation would be proper for as Rugg C. J. stated: "The plea in abatement was properly overruled. The pendency of a suit in equity is not usually sufficient ground for sustaining a plea in abatement to an action at law. This is especially true where the plaintiff in each case is not the same."

Accordingly in order to avoid proceedings in two courts the following draft act provides for abatement.

I wish to express appreciation of the assistance which I have received in the preparation of this paper from George Goldberg, Esq., of the Boston bar.

SAMUEL MELINE.

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DRAFT ACT RELATIVE TO ATTORNEYS' FEES AND LIENS AND PROCEDURE RELATING THERETO.

Chapter 221 of the General Laws is hereby amended by striking out section fifty and inserting in place thereof the following three sections:

Section Fifty.

On petition of any of the parties interested, courts having jurisdiction in equity shall determine the validity and amount of the liens mentioned in Section Fifty A and Section Fifty B and shall enforce the same by appropriate decree.

Any district court in the judicial district where any respondent lives or has an usual place of business, on petition of any party in interest shall on not less than seven days nor more than fourteen days notice to the respondent, in a summary proceeding, wherein a full hearing on the merits shall be had, adjudicate the validity and amount of the lien. Such adjudication shall be conclusive evidence of the amount and validity of the lien subject to proceedings for review on questions of law by the appellate division of said court in accordance with rules to be made as other rules are made for the respective district courts. Such petition shall be abated if at any time before adjudication a petition is filed in any court having jurisdiction in equity as hereinbefore provided.

Section Fifty A.

Attorneys shall have a lien upon all claims, counterclaims, demands and causes of action, including such as are for unliquidated damages, which may be placed in their hands by their clients for suit or prosecution, or upon which suit or action has been instituted or services rendered, for the amount of any expenses, disbursements and fees which may have been agreed upon by and between them, or, in the absence of such agreement, for expenses and disbursments and a reasonable fee for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, counterclaims, demands or causes of action. Provided, however, such attorneys shall give notice in writing to the party against whom their clients may have such suits, claims, counterclaims, demands or causes of action, or to such party's attorney, agent or insurer, of his employment as attorney therein, but where such party, his attorney, agent or insurer has actual notice of the employment of the attorney such notice will be sufficient, and where an action or proceeding is commenced or an answer containing a counterclaim is filed, the attorney who appears for a party has such lien without other notice.

Such lien shall be superior to the rights of others which attach subsequent to the time such lien attaches, but, shall not prevent the payment in good faith and without notice, of such claim, counterclaim, demand or cause of action. Such lien shall attach to any

verdict, judgment, execution or decree and to any money or property which may be recovered, by settlement or otherwise, on account of such suits, demands, claims, counterclaims or causes of action, and to the proceeds thereof in whosesoever hands they may come, and shall not be affected by the discharge of the attorney having such lien.

The lien herein provided shall not be limited to such fees, expenses, and disbursements as are allowed in the bill of costs but shall also extend to all reasonable attorneys' and counsel fees and all reasonable expenses and disbursements charged or incurred in the prosecution of such claims, counterclaims, demands or causes of action.

Section Fifty B.

An attorney has a lien for a general balance of reasonable compensation for services rendered as attorney or counsellor at law and for expenses and disbursements connected with the performance of such services upon any papers or moneys of his client which have come into his possession in the course of his professional employment.

EDITORIAL NOTE.

The subject of liens has caused considerable discussion before the legislature in recent years, particularly since the depression set in, and there have been bills before that body not only in regard to lawyers' liens, but for the purpose of creating liens for doctors, hospitals, nurses and others. A bill to provide a lien for hospitals was referred to the Judicial Council several years ago by the legislature with a request for a report and the matter was discussed in the seventh Report of the Council (pages 36–37). During the last two sessions of the legislature, there was an active movement in favor of various measures to create a lien for doctors as well as hospitals or for other methods of protecting their interests. The doctors' difficulties were discussed in the MASSACHUSETTS LAW QUARTERLY for May, 1934 (pp. 43–44). A serious part of the doctors' difficulties arise from the way some of them are treated by some lawyers, who retain the amount of the doctor's bill when settling with the client and then fail to pay it over. As suggested in the QUARTERLY above referred to, "A lawyer who collects the amount of a hospital or a doctor's bill and does not pay it should be summarily dealt with under G. L. Chap. 221, S. 51, which might be made more effective by a rule of court providing a direct pro-

cedure by the hospital or doctor in the name of the client. When the client himself "welshes" the hospital or doctor is simply in the position of any other creditor. The state can hardly be expected to provide first mortgages for all creditors."

As to a lawyer's lien, as pointed out in Mr. Meline's article, there is a considerable amount of legal history on the subject and a lawyer's services, when needed and properly rendered, contribute so directly to the result that the law in other jurisdictions appears to have provided the lawyer with more protection than is provided in Massachusetts. The history of the statutes and decisions in Massachusetts raises the serious question whether the present statute should not be amended.

If this is done, however, the first part of Mr. Meline's draft statute providing some summary remedy, not only for the lawyer, but for the client, also, should be seriously considered, for as Mr. Meline points out in his opening paragraph, the problem of unreasonable charges by attorneys is the subject of constant complaint, as grievance committees well know, and there should be some summary proceeding in which such complaints could be heard on application either of the client or the lawyer. F. W. G.

SHOULD WITNESSES BE EXCLUDED WHILE OTHER WITNESSES TESTIFY?

The Editor has received the following communication from a member of the bar:

> "It has been my experience in a number of cases that when witnesses are permitted to remain in the court room during the testimony of others, it consciously or unconsciously affects the veracity both of the testimony and the witnesses. I have personally known of instances when witnesses have testified to matters to which they had no or incomplete knowledge, having taken their testimony almost verbatim from the preceding witnesses to whom they had listened. I have in mind a recent case in which a defendant in a criminal matter called two witnesses to testify in his behalf immediately after he himself had testified. One of these corroborative witnesses had absented himself temporarily from the court room for a smoke while the defendant had testified and it was most astounding to notice the discrepancy between the two corroborative witnesses. The one who had been present in the court room verified almost ver-

batim the testimony of the defendant; the other witness who was absent, floundered around, didn't remember and only upon leading questions was any real testimony obtained from him.

Without any question, this must be a matter which has been discussed by attorneys and bar associations for sometime although if such is a fact, it has never happened to have been brought to my attention. It seems to me, however, to be such a pressing need that I am glad of this opportunity to lay it before you and request your reaction to it. In my belief, it would be a great stride forward in the proper administration of justice.

Very truly yours,"

EDITORIAL NOTE.

The courts now have discretionary power to exclude witnesses. The question raised by the foregoing letter is whether this power should be used more often. There seem to be two sides to that question but it may be worthy of serious consideration by experienced judges. F. W. G.

INFORMATION FOR LAWYERS WHO ADVISE AS TO CHARITABLE GIFTS AND LEGACIES.

The Editor has received the following information from Ripley L. Dana, General Chairman of the Community Fund Campaign.

The Community Federation of Boston was incorporated in May, 1935. Mr. Charles Francis Adams is its president. Forty representative men and women of Boston comprise its Board of Directors. Its purpose is to finance the needs of the one hundred hospitals, settlements, family welfare units, child guidance and character building organizations, and other Boston welfare and social agencies which are included in its membership.

The headquarters are at 70 Federal Street, Boston (telephone Hubbard 8600).

AN INFORMATION FILED IN THE SUPERIOR COURT BY THE PRESIDENT AND THE SECRETARY OF THE MASSACHUSETTS BAR ASSOCIATION IN OPPOSITION TO A PETITION FOR REINSTATEMENT.

In the QUARTERLY for May, 1935 (pages 49–52), two informations, one in connection with a proceeding relative to unauthorized practice and the other in opposition to a petition for reinstatement, were printed, with the names of the individuals involved omitted, for the information of members of the Massachusetts Bar Association, in order that the position taken in these matters by officers of the association may be clearly understood. For the same reason, the following information in opposition to another petition for reinstatement is printed with the name of the individual omitted. In this case, Judge Pinanski made an order, which might well have been adopted as the regular practice in such cases many years ago, referring the matter to the Board of Bar Examiners for investigation and report. The board filed an unanimous report, signed by all the members of the board, in which, after finding and reciting the facts, they concluded as follows:

> "The Board of Bar Examiners is unable to recommend the petitioner's reinstatement. He apparently made a bad start in . Nothing specific concerning his conduct in prior to the transaction which gave rise to the indictment has been called to our attention. It is however quite inconceivable to us that such an indictment would have been found against an attorney otherwise of unquestioned reputation. We feel that a conviction on such an indictment permanently ended his usefulness as a practicing attorney even though he has now lived down the damage to his reputation resulting from it. He is entitled to commendation and encouragement for so doing but not for that reason to reinstatement to the bar where this record of breach of trust will prove a detriment both to himself and to the bar.
>
> "Then in view of the recently adopted rule of the Supreme Judicial Court requiring a re-determination by this board of the legal qualifications of applicants for reinstatement after disbarment, we do not feel that such qualifications ought to be presumed in this case after the petitioner has been fifteen years out of the bar. We do not feel however that we ought to request the petitioner to submit to a law examination without express direction of the court.
>
> "The board feels obliged to recommend to the court that this petition be denied."

Copy of this report, together with copy of the petition for reinstatement and other papers on file with it, was sent, by direction of the court, to the secretary of the Massachusetts Bar Association. Thereafter, the information hereinafter printed was filed and two county bar associations were notified of the date of the hearing and supplied with a copy of the petition and report of the Board of Bar Examiners and other papers on file at the request of the court.

The petition in the case was as follows, the names being omitted:

"PETITION FOR REINSTATEMENT.

Respectfully represents of in said county, formerly of in the county of in said Commonwealth, that on a day certain, to wit the seventeenth day of May, A.D., 1920, he tendered to this Honorable Court his resignation of his right to practice law and his resignation from the Bar of the Commonwealth, which resignation was accepted by this Honorable Court;

That since that day he has not practiced law or acted as a member of the bar either directly or indirectly;

That he has conducted himself as an upright and honest citizen;

That he is of good moral character;

WHEREFORE he prays this Honorable Court to reinstate him in his right to practice law and as a member of the bar of this Commonwealth.

The above petition and its allowance is approved by me X Justice Superior Court."

As the petition for reinstatement carried a signed approval by the justice of the Superior Court before whom the petitioner had been tried and convicted in 1919, we quote the passage from the report of the Board of Bar Examiners relative to the judge's relation to the case:

"On December 17, 1918, the petitioner was indicted jointly with one for larceny of $1,600. in bonds of the United States, the property of one . On this indictment the petitioner was arrested, released on bail, and after various preliminary proceedings was on October 2, 1919, found guilty by a jury after a trial before Hon. X as presiding justice. He was thereupon on that day sentenced to imprisonment in

the House of Correction for a term of one year. Also upon the same day on his motion for a stay of execution pending exceptions to the Supreme Judicial Court, Mr. Justice X certified that in his opinion there was a reasonable doubt whether the judgment should stand and ordered a stay as requested until the further order of the court. On or about the same date the petitioner was again admitted to bail. The time for filing exceptions was extended from time to time but no exceptions were actually filed, and on May 17, 1920, upon the petitioner's motion for a vacation of the sentence against him, he was placed on probation upon a recognizance in the sum of $200. with the probation officer of the Superior Court for the county as surety. It was one of the conditions of this recognizance that the petitioner should repay $1,600. to . On the same day at the request of Mr. Justice X and prior to the foregoing proceedings, the petitioner submitted his resignation as a member of the bar as annexed to the petition, and this resignation was at once accepted by order of the court. The payment of $1,600. as required was duly made, the petitioner obtaining the money by borrowing. No further proceedings were had on this indictment and it was placed on file on January 7, 1927."

It is noticeable that the petition for reinstatement contained no information whatever as to the circumstances, or causes, of the resignation of the petitioner. We suggest that the courts adopt a rule that if a person, who has resigned from the bar, applies for reinstatement the circumstances, or causes, of resignation *must* be stated frankly and clearly in the petition before it will be considered. The information filed as aforesaid was as follows:

COMMONWEALTH OF MASSACHUSETTS.

, ss. SUPERIOR COURT.

IN THE MATTER OF — — — — —

PETITIONER FOR REINSTATEMENT AS A MEMBER OF THE BAR.

INFORMATION SUBMITTED IN OPPOSITION TO REINSTATEMENT, FOR THE PROTECTION OF THE COURTS AND THE PUBLIC.

To the Honorable the Justices of the Superior Court,

Having been notified by direction of the court that the petitioner above named has filed a petition for reinstatement as a member of the bar in said court and that said petition was re-

ferred to the Board of Bar Examiners by the court for investigation and report, and having been furnished by the clerk by direction of the court with a copy of the unanimous report of the Board of Bar Examiners, after hearing the petitioner and investigating the matter in which the Board of Bar Examiners unanimously state that "they feel obliged to recommend to the court that this petition be denied", the undersigned Nathan P. Avery, of Holyoke, and Frank W. Grinnell, of Boston in said Commonwealth, as individual officers of the court and as president and secretary of the Massachusetts Bar Association, one of the charter purposes of which was that of "upholding the honor of the profession of law", respectfully submit the following information for the consideration of the court in the public interest in accordance with the opinions of the Supreme Judicial Court in the Matter of Casey, 211 Mass. 187, and in the Matter of Keenan, 287 Mass. 577 and other cases therein referred to relating to the function of the court and of members of the bar.

It appears from the report of the Board of Bar Examiners that the petitioner was convicted of a serious offence after indictment and trial in the Superior Court in County, and that thereupon he offered his resignation from the bar which was accepted by the court and his name was stricken from the list in 1920, as shown by the record.

We respectfully submit that the Board of Bar Examiners should be supported in their opposition to reinstatement of the petitioner; that when a man is once removed from the bar under such circumstances as exist in this case, whether by order following acceptance of resignation, resignation or disbarment, he should stay out; that it is against the public interest that a person with such a record should be admitted to the bar and that having been admitted and removed because of such record it would be against the public interest for the court to reinstate him upon considerations of sympathy for his family or other reasons of that kind.

We respectfully submit that when men have been convicted of such offences and removed from the bar, as the Supreme Judicial Court has repeatedly stated, it is not a question of punishment as in criminal proceedings, but the question before the court is one of maintaining public confidence in the profession.

We respectfully submit that the reinstatement of the petitioner under circumstances disclosed in this case would injure the public confidence in the profession and lower the standards of the Massachusetts bar and of the Massachusetts courts.

Respectfully submitted,

(s) NATHAN P. AVERY.
Individually and as President of the Massachusetts Bar Association.

(s) FRANK S. GRINNELL.
Individually and as Secretary of the Massachusetts Bar Association.

REPORT OF BRISTOL COUNTY BAR ASSOCIATION ON THE SUBJECTS BEING INVESTIGATED BY THE SPECIAL COMMISSION ON THE JUDICIAL SYSTEM.

December 30, 1935.

Secretary of The Massachusetts Bar Association,

DEAR SIR:

The enclosed report was accepted by a unanimous vote of the Bristol County Bar Association at their meeting held at Taunton, Massachusetts, on December 11, 1935.

Truly yours,

WILLIAM J. FENTON, *Secretary.*

REPORT.

1. We approve full time service of justices sitting in district courts as is hereinafter recommended.

2. We approve a rotating or circuit system, in place of a district court, with justices on a full time basis, with an adequate salary of not more than $9,000.00, per annum, and they be excluded from practicing in any of the courts of the Commonwealth, the justices are to include the present standing justices of the district courts.

3. We favor full time service for the standing justices of the district courts with a salary of not more than $9,000.00, per annum.

4. We favor a revision of the salary schedules for justices of the district courts if full time service is required.

We are in favor of the abolition of the office of special justice.

In regard to the revision of salary schedules for clerks and assistant clerks of district courts: This requires further study, but we favor adequate compensation based on the population of the district and the extent of the business done in the court.

5. We favor immediate abolition of the offices of special justices of district courts.

6. As to granting the Supreme Judicial Court full power to make rules regulating pleading, practice and procedure in the courts.

We are not sufficiently informed to make any recommendations on this matter.

7. At the present time we oppose increasing the number of justices of the Superior Court to 41.

8. We favor granting to the administrative committee of the district courts the power to establish the time of the opening of such courts.

9. Under the present system we oppose the practicing of law by justices and special justices, sitting in district courts, in all courts and by clerks and assistant clerks in courts of their jurisdiction.

10. We oppose providing for trial of civil actions in district courts by juries of six.

WE RECOMMEND: That if a circuit or rotating system of district court is not established we propose for Bristol County a district court system under which there will be a standing justice of the court in New Bedford, Fall River, Taunton and Attleboro and in addition thereto an associate justice in New Bedford, Fall River and a third associate justice from the district composing the First and Fourth Bristol Districts. All justices to render full time services with adequate compensation and the said associate justices be rotated as is necessary to perform and expedite the business of all the district courts of the County and the present standing justices of the district courts be retained.

WILLIAM J. FENTON, *Secretary.*

REPORT OF THE LAWYERS' COMMITTEE CO-OPERATING WITH E.R.A.

217 LAWYERS' BUILDING
BOSTON, MASSACHUSETTS
DECEMBER, 1935

Report of Lawyers' Committee Co-operating with E. R. A.

In September of 1934 the Federal Government, through the Administrator of the "Federal Emergency Relief Act", requested the Bar Association of the City of Boston and the Massachusetts Bar Association to cooperate with it in providing relief for needy lawyers. As a result, the President of the Massachusetts Bar Association appointed this Committee, including on it certain members suggested by the President of the Boston Bar Association.

The Committee had two major problems:

1. To determine the number of lawyers who were eligible for relief. It was required that they be in considerable need, without funds, property, or source of income, and have at least two dependents.

2. To find legal work which would be useful and valuable to the community.

The Administration insisted that the work be sponsored by some responsible organization or municipality, and that it be such that it would be outside the normal activities and would not ordinarily be undertaken. We immediately communicated with over three hundred local E.R.A. Administrators, the leading lawyers in various towns and cities throughout the Commonwealth, and important city officials in Boston, asking for coöperation. We also solicited the coöperation of several local bar associations, and with their support and help projects were later set up in their communities.

It was difficult, and in some places impossible, to find out which lawyers were eligible for relief because they were, in many instances, too proud to indicate their condition. However, it was finally estimated that there were at least three hundred lawyers in the state who could qualify, some of whom were already on city welfare rolls. Several weeks were spent in filling out forms and in preparing statements before the necessary project applications could be filed. Progress was slow, and at times rather discouraging, owing to the inexperience of the authorities, lack of coordination, and an occasional tendency to play politics, which perhaps could be expected under the circumstances. However, in some cities we received full cooperation.

State or County projects were not permissible, and in order to take care of the needy who were scattered throughout the state, a project

had to be set up in a specific locality for the employment exclusively of residents of that locality. The secretary of the Committee personally interviewed more than two hundred and fifty lawyers and found the condition of many deplorable. Most of them had been forced to give up their offices, and many were in danger of being evicted from their homes, and were otherwise in a desperate plight. *Appendix I* records a few specific cases, typical of those with which the secretary came into contact, and which clearly indicate the value of these projects to the lawyers for whom they were intended. That, in return, the work done by these lawyers has been valuable is indicated by a letter from Samuel S. Dennis, Esquire, Assistant Corporation Counsel for the City of Boston, who saw a great deal of the work done by these E.R.A. lawyers. (*See Appendix II.*)

There are now approximately one hundred and seventy-five lawyers engaged in legal projects of one kind or another throughout the entire state. More than half are employed in Boston, but there are also projects functioning in Braintree, Brookline, Cambridge, Newton, Revere, Winthrop, and cities as far west as Springfield and Holyoke. It is important to point out that in practically every case the lawyer had two or more, dependents because of the E.R.A. requirements, and the amount earned per week varied with the number of dependents. The maximum salary was fixed at $1.20 per hour for a maximum twenty-four hour week, making a total of $28.80 per week.

Some of the projects are as follows:

GENERAL PROJECTS

1. Assistance in preparing the Massachusetts Annotations for the Restatement of the Law of Trusts.
2. Assistance in preparing the Massachusetts Annotations for the Restatement of the Law of Agency.

This work was already in progress but at private expense, an unfair drain on the men who were donating time and money. Several lawyers selected by the Committee were put under experts in charge of the work, thereby materially hastening the completion of the annotations and relieving private individuals of considerable expense. These two projects will be of great value to the Bar of Massachusetts because the Restatement of the Law prepared by the American Law Institute is a general statement of law without reference to local decisions. The annotations of these two subjects will concisely cover each section of the restatement, indicating whether the Massachusetts decisions are contrary or in accord, and will contain in many places discussions reconciling differences.

MUNICIPAL PROJECTS

3. **Building Department**

Legal investigation concerning taking down unsafe, dilapidated, and obsolete buildings.

4. **Park Department**

Compilation and preparation of abstracts of all statute laws, etc., pertaining to this department.

5. **Public Library**

Classification of legal matters.

6. **City Planning Board**

Survey of the laws covering several phases of activity of this department, including practice and procedure in connection with land takings for public improvements, both in the United States and in England.

7. **Collecting Department**

Examination of old claims for taxes and other collections due the City.

8. **Department of School Buildings**

Conducting examination of specifications and contracts given out in the past for the purpose of ascertaining defects and errors, and preparing new forms and specifications to avoid repetition of errors.

9. **Auditing Department**

Research and investigation into the various statutes and ordinances regulating the work of this department, special study to be given to Chap. 44, the Municipal Finance Act.

10. **Election Department**

Codification of Laws relating to elections.

11. **Assessing Department**

A. Examination of records at registry of deeds pertaining to tax titles held by the city, for the purpose of check-up and correction.

B. Checking names and addresses of mortgagees of down-town property.

C. Examination of records at Probate Court with relation to property not assessed to heirs and devisees.

D. Examination of records at Registry regarding leases on down-town property for use in estimating value of property and petitions for abatement.

12. **Law Department**

Research work in connection with tax titles and general taxation problems.

These E.R.A. projects are at present about to be transferred to W.P.A. (Works Progress Administration) and under the latter, lawyers will be employed for one hundred and twelve hours per month, and receive $94. Also, new projects are being created under W.P.A. for additional lawyers to carry on further legal research.

So far as the Committee has been successful in diminishing distress among members of the legal profession the credit is primarily due to the efficient efforts of its hardworking and conscientious secretary, Moses D. Feldman. He has been materially aided by leading lawyers in various parts of the state who have helped to secure effective cooperation from local E.R.A. administrators.

The Committee also wishes to recognize the generosity of The Boston Bar Association and the public spirit of those unnamed law firms whose donations made it possible more efficiently to administer the funds provided by the Federal Government.

The Committee throughout has acted as a general clearing house for lawyers in need of aid. Its experience may perhaps be helpful whenever the Bar of Massachusetts gives thought to the larger question of establishing permanent machinery for the relief of its indigent members.

Respectfully submitted,

LAWRENCE G. BROOKS,
Chairman for the Committee

FRANK W. GRINNELL

WILLARD B. LUTHER

GEORGE D. WHITMORE

MOSES D. FELDMAN, *Secretary*
217 Lawyers' Bldg.
Boston, Mass.

APPENDIX I

TYPICAL CASES REPORTED TO THE SECRETARY

CASE I

A former holder of a public legal office, married, and the father of six children. He was destitute, without food and coal, and practically living off the bounty of some friends who occasionally sent in a basket of provisions and some coal. The father had lost all hope but was too

proud to go to the City Welfare. Fortunately one of his friends informed me of his condition and I immediately communicated with him and made arrangements to have him fill out an application for a job on an E.R.A. project. This was no little task at that time. There were daily lines of applicants numbering from five hundred to one thousand and extending for blocks outside the E.R.A. headquarters, so that it was an ordeal indeed to file an application. In theory, since this country is a democracy, there was no reason to except lawyers from standing in line for hours with applicants seeking work on snow removal and other labor projects, but it can be easily understood that lawyers resented this. After a great deal of difficulty I was able to cut some of the "red tape" and my man's application was accepted without the necessity of waiting, but then our troubles began. I was informed that he could not be assigned to a job because he had not been investigated by the Social Service Division, and, of course, we would have to wait for their report, which in the past had sometimes taken weeks and even months. Risking the displeasure of some officials I succeeded in having an immediate investigation. His condition was apparent immediately, and he was placed on a project which called for twenty-four hours work per week at a salary of $28.80.

CASE 2

A former successful practitioner whose practice was wiped out by the depression, married, and the father of three children, had been forced to give up his law office. Conditions were so bad that electric and gas service had been turned off at his home, and when I interviewed him an eviction action was pending against him for the apartment which he occupied. He had reached the lowest depths of despair and was ready to do any form of work but was unable to obtain any. He remarked that "he was worth more dead than alive" and I was afraid that unless something was done for him immediately, he might end his life in order to allow his family to collect his insurance. I tried to encourage him as much as I could and in due course succeeded in getting him assigned to a project at $28.80 per week. This man is still employed and when I see him occasionally it is quite apparent that he has found a new lease on life, and, incidentally, he has been doing an excellent job on the work that he has been assigned to.

CASE 3

The father of a large family whose condition was as bad as in the preceding cases, but his application was turned down because he was the owner of the home in which he lived. Of course, it made no difference that his mortgage was long overdue and that the bank was about to foreclose. He was a property owner! Therefore he was not eligible. It seemed that those who had been thrifty were now being punished and the less a man had the better off he was. However, after the foreclosure went through and the last vestige of ownership was wiped out he was assigned to a project, and is still employed.

APPENDIX II

LAW DEPARTMENT OF THE CITY OF BOSTON

November 9, 1935.

Moses D. Feldman, Esquire
11 Beacon Street
Boston, Mass.

Dear Sir:

Replying to your request for a report on the work done in the Law Department by E.R.A. Lawyers will say.

There are at present four E.R.A. projects in the Law Department. Some of these projects are legal research projects and others concern the examination of law regarding claims against the city and tax liens held by the city.

At the time these projects were started there was a vast volume of cases which had accumulated in the past and there was an opportunity for a great deal of constructive work. A compilation of all the laws relating to the City of Boston and governing its activities is in progress. A careful and exhaustive research has been conducted and when this compilation and digest is completed it will be of great value to the city in the future conduct of its affairs.

There was also the problem created by about 6,000 tax titles held by the city, involving many questions of law and fact. A Tax Title Division was set up and a great deal of work, done by E.R.A. lawyers, was turned over to this division for action. With the assistance of the work done by these E.R.A. lawyers and to a great extent because of it, there has been brought into the City Treasury during the current year approximately $1,000,000, resulting from the disposition of 1,500 old tax title claims.

In addition to the number of cases disposed of, preparatory work has been done on about 2,500 additional cases and the data thus collected has been turned over to the Tax Title Division and these cases are now in the process of collection or other disposition.

The E.R.A. lawyers assigned to the Law Department have shown a marked interest, intelligence and fidelity in the performance of their duties and their work has been of great assistance and value to the city and citizens of Boston.

Very truly yours,

(Signed) SAMUEL S. DENNIS